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CURRENT TOPICS.

THE ENGLISH law journals have a morbid dislike of the practice which they call "touting," which, if we understand it rightly, refers to the publishing of a professional card or advertisement in the newspapers—a practice which, we infer from the peculiar word used to designate it, is held to place one in the attitude of blowing his own horn. The extent to which the opposition to this practice is apparently carried in England seems to us ridiculous in the extreme. Thus, we find the following in a late number of the Solicitor's Journal: "Last week a communication relating to a change in the members of a legal partnership was inserted in the advertisement columns of this journal. We need hardly say that this was due to a pure oversight in the publishing department, and was not intended or desired either by the legal firm referred to or by the publisher of the Journal, who has invariably refused to receive any advertisements of this kind." There can surely be no impropriety in a man telling the public through the newspapers that he is a lawyer, and that he has his office in this or that place, or that he has formed or dissolved this or that partnership connection. If it is wrong to print such information, then it must be equally wrong to communicate it by word of mouth. There is, however, a gross impropriety in a lawyer running a daily newspaper as a part of the machinery of his business, devoting a considerable portion of its editorial space to articles written by himself or at his dictation, extolling or vindicating his own professional conduct. There is also a gross impropriety in a lawyer paying twenty-five dollars to have a fulsome biographical sketch of himself a column in length, published in a daily newspaper, extolling him as one of the greatest of living lawyers, when he is not. We are sorry to say that good lawyers have had the indiscretion to do this; but their conduct, nevertheless, deserves a severe rebuke at the hands of their brethren.

THE AMERICAN LAW REVIEW is not entirely satisfied with Dr. Wharton's treatise on Evidence. It seems to think that he *contracts* too much in some places and *expands* too much in others. "We object," says the editor, "to some of the terms constantly used,—'Anglo-American' courts, for instance, meaning English and American courts; 'contractually,' meaning 'as a contract,' etc. * * To the ordinary reader such a sentence as this is rather appalling: 'The credibility of a self-disserving, non-contractual admission, therefore, is a question of fact, resting on the presumption that no prudent man would declare an untruth to his own disadvantage.'" We presume that this extraordinary expression, "self-disserving, non-contractual admission," means an admission which does not *serve* the party making it, and is not made in pursuance of any contract between him and another person. We humbly suggest that, in stating this proposition, Dr. Wharton has left an important element out of view—just as Bishop Simpson, in the celebrated sermon which he preached before Mr. Lincoln, forgot to "strike ile." The Doctor should have said "a self-disserving, non-contractual, non-duressitive admission," and then his statement would have been complete. The editor of the Review also objects "to such matters as the frequent long extracts,—mostly in the notes, however,—from Chief Justice Cockburn's charge in the Tichborne case (a charge which, we may say in passing, while certainly a masterly presentation of the facts, was to our thinking so conspicuous an illustration of bias that an American judge would almost be impeached for making it); anecdotes or reports of trials in inferior courts culled from the newspapers; and similar extraneous matters which, however interesting in themselves, do not seem to accord with the general character of the book, and take up valuable space."

The above are matters of legitimate criticism. But when, in the following language, he was so unkind as to hint that Dr. Wharton *may*, somewhere in his book, have plagiarized the writings of other men, he went so far out of his way as to give a decidedly *commercial* tinge to what he has written: "We are unable to say whether Mr. Wharton has incorporated into this book the product of the labor of other men without acknowledgment; but, our attention having been called to the complaints of our contemporary, the London Law Times, with reference to his treatise on Agency, we take occasion to say that, when an author sees fit to adopt the exact phraseology of another writer on the same subject, and to rely upon that other's examination of authorities so entirely as even to repeat a misprint in the name of a case cited, it is esteemed at least graceful to indicate, by some reference to its source, that the language is not original." After reading the above, we strongly suspect that the editor of the American Law Review is *sorry* that Dr. Wharton's work on Evidence has been written.

IN AMERICA we have a mythical official called the Fool-killer, whose office is supposed to be to visit with sudden and merciful taking-off those people who have not sense enough to live. It is evident that this mysterious official either does not exist in Scotland, or else that he has not made his rounds there in a long time. For, in an address recently delivered to the class of public law in the University of Glasgow, by a learned (?) professor, Lorimer by name, we find the following language: "But what I assert is, that America, as it at present exists, and as it existed for a long time previous to the civil war, combines in its internal

government most of the evils of a despotism, as well as of a democracy, and exposes foreign governments, in dealing with it, to the danger arising from both of these forms of government. The chief reason why a despotic country is dangerous to its neighbors, as I have already indicated, is that you can not reason with it directly; you can not get at it, as you get at a free country, through its press; it is not permitted to listen to what you have to say to it in support of your claims or your remonstrances, and it becomes acquainted with them only when it experiences the consequences of their rejection. Now the very same difficulty exists in dealing with America. King Mob has there gagged the press as effectually as any brother despot that ever gave a warning. He will not allow himself to be spoken to, except in accents of adulation and assent; and if you approach him in any other tone, the only answer which he deigns to make to you is a re-assertion of his former position, as confident and uncompromising as if it proceeded from the Comte de Chambord or Pio Nono himself. Strange and almost incredible as it seems to us, the sad and instructive fact is attested by writers of the very highest authority, native and foreign, that this democratic country has shut itself out from the advantages of free political discussion so effectually that it is perhaps not too much to say that no monarchical state in Europe ever was as impervious to the voice of counsel from without as America has been during the present century."

It is possible, however, that the office of fool-killer in Scotland is a *sinecure*, and that it is this fact which has rendered possible the remarkable language which we have just quoted. Now, if any of our readers have not had the advantages of a classical education (and there have been good lawyers in America who have not), we will venture to tell them that a *sinecure* is supposed to be an office *without care*. Now, it is an excellent thing to be without care, and it is entirely right that one should be so, if he can be so at his own expense. But to relieve one man from care at the expense of others who are themselves loaded down with care, is the grossest injustice. A government which does this violates in the highest essential the basis of allegiance; a church which does it turns religion into an insult and a fraud. Now we do not know that any sinecure offices exist in Scotland, but we are sorry to learn from the following, which we find in the Solicitor's Journal, that some of them do exist in England: "The death of Viscount Canterbury, says the London correspondent of the Manchester Guardian, renders vacant a sinecure office of considerable value —namely, the registrarship of the faculties of the province of Canterbury. This ecclesiastical appointment was conferred upon the deceased nobleman when he was quite an infant by his grandfather, Dr. Manners Sutton, the then Archbishop of Canterbury. The duties of the office were executed by deputy, whilst the emoluments consisted, and still consist, of the major proportion of the fees payable on faculties for church restoration, monuments, and for marriages by the archbishop's potent special license. The late Viscount's elder brother was also provided for in the same way by the worthy grandfather, he having held from childhood the sinecure post of registrar of the Prerogative Court, the value of which may be estimated when it is said that, on the abolition of the court in 1858, the sum of £7,000 a year was awarded as compensation to the noble registrar. I understand that Viscount Canterbury's successor at the Faculty Office will have to perform the duties personally, and at a very greatly reduced stipend; also that the appointment will be united to that of the registrar of the province. The surplus will be disposed of under the provisions of the Ecclesiastical Offices and Fees Bill now before Parliament." "*Noble* registrar," in such a connection, sounds decidedly refreshing on this side of the Atlantic. The education and habits of Americans (bad as these people are) will lead them to think it most *ignoble* for a man to consent to live upon the fees of an office which requires no service at his hands—fees which are wrung from the sweat of those who labor—for none but such pay taxes;—and still more ignoble that such offices should be apportioned out by the highest minister of religion to his own grandchildren—and this, too, in a country where hundreds of thousands of toiling people are so poor that it is esteemed a crime for them to beget children, and where their children can not remember when they were covered with anything but rags, or had their bellies full of the coarsest bread!

In McCain v. Jewell, 24 Pittsburgh Legal Journal, 185, the Common Pleas Court of Armstrong County, Pennsylvania, ruled that a litigant could not be imprisoned for refusing to satisfy a judgment for the payment of costs. The plaintiff had been granted a continuance on payment of the costs of the term. Upon his refusing to pay them, a rule was obtained against him to show cause why he should not be attached for contempt. In giving judgment, McDermitt, P. J., made the following interesting observations: "The legal title to officers' and witnesses' fees, is in the prevailing party as their trustee; and they can issue execution in his name for their collection. Ranck v. Hill, 3 Barr, 423. Payment of costs to persons to whom they do not belong, is no payment. Ellsbre v. Ellsbre, 4 Casey, 172. A trustee's process for the collection of money *must* correspond with the nature of the contract between the debtor and his *cestuis que trust*. Between parties to a civil suit there is a mere implied contract that the defeated party shall pay his adversary's costs; and whether he is legally liable to pay them, under an interlocutory order, or decree of the court, or upon the verdict of a jury with the judgment of the court thereon, is immaterial, when an attachment is sought to enforce their collection. The language of an attachment is, in effect, 'pay the money or

go to prison.' The ground upon which this attachment was so ably urged was, that the plaintiff, McCain, in refusing to pay the costs, was guilty of a contempt of court. Whether a contempt has been committed, is a question for the determination of *the court* against which it is alleged to have been committed. Williamson's Case, 2 Casey, 9. A contempt of court is a 'substantive criminal offence.' Com. v. Newton, 1 Gr. 453. 'It must be remembered, that a contempt of court is a specific criminal offense. It is punished sometimes by indictment, and sometimes by a summary proceeding. * * * In either mode of trial, the adjudication against the offender is conviction; and the commitment in consequence is execution. * * * When it is committed in a pending cause, the proceeding to punish it is a proceeding by itself. It is not entitled in the cause pending, but on the criminal side.' Williamson's case, *supra*. The non-payment of money, decreed to be paid upon a mere implied contract *can not* be a 'substantive' or 'specific criminal offense.' Constitutionally the courts are open to 'every man for an injury done him in his lands, goods, person, or reputation.' * * * Can a party only obtain his legal rights at the peril of his liberty? He can before me. The Act of 1842, abolishing imprisonment for debt, 'prohibits arrest on civil process for the recovery of money due upon contract, express or implied, or due upon judgment or decree founded upon contract.' See this act, also Scott v. Jailor, 1 Gr. 237; Chew's Appeal, 8 Wr. 247; Jones' Appeal, 14 Wr. 285. Whenever the decree or order is solely for the payment of money, the party ordered or decreed to pay it can not be taken in execution (bodily), either by process in equity or at common law. Estate of Hugg and Bell, 1 P. F. S. 237. The plaintiff, Mr. McCain, against whom the attachment is prayed, has, in the opinion of the court been guilty of no breach of trust, no violation of any fiduciary relation toward the parties entitled to said costs; and he *can not*, therefore, for his refusal to pay them, be adjudged guilty of a 'substantive' or 'specific criminal offense' against the court; for his refusal touches not his conscience, more than does the refusal of any debtor to pay a simple contract-debt does him."

FOLLOWING TRUST PROPERTY.

The case of Brocchus v. Morgan, from the Supreme Court of Tennessee, which we publish on another page, will be found a valuable contribution to the law upon the subject of following a trust fund, by reason of the peculiar facts of the case, and the nature of the relief given. The rule of law governing the case is there said to be exceptional, and is applied as a principle of equity, supplementing and relieving the defective character of the common law. It is possible that this distinction was unnecessary. The cases in which the same principle is applied, both at law and in equity, are becoming so numerous, that it may now be well regarded as an established feature of Anglican law. But its application to the circumstances of any new case will be found useful no less than interesting.

In Brocchus v. Morgan, the proceeds of the trust-money are not only traced into and out of a bank account, but afterwards into the hands of a receiver for creditors, from whom they are allowed to be recovered by the true owner. There was a time when, beyond doubt, such relief would have been refused. But even then, the principle existed and was recognized as a part of the English law, which, preserved and applied to the new demands of our later civilization, has been found more potent and beneficial than our forefathers in the law had ever dreamed to be possible. The growth and progress of this principle have been steady, and it has expanded continuously with the necessities of new cases. To trace this growth and expansion, will be to learn how powerful and extensive is the practical operation of this principle in our jurisprudence of to-day.

The origin of this principle of law is found as far back in the English decisions as 1708. The ruling of Lord Holt, in L'Apostre v. Le Plaistrier, a suit at law, in that year, was approved in several later cases, and was followed in Copeman v. Gallant, 1 Peere Williams, 320, in 1716, where Lord Chancellor Cowper held that property entrusted to a factor, with power to dispose of it for his principal, did not, upon the bankruptcy of the factor, pass to his assignees, but was still the property of the principal. The earlier decision of Lord Holt was cited in the argument of this case. In both of these early cases it seems that the identical and original trust-property was found in the hands of the assignees after the bankruptcy. To allow the owner of the trust-property to recover it in such cases, would seem at the present time a simple and easy application of the rule. An extension of it was, however, early called for, and allowed. In Burdett v. Willett, 2 Vernon, 638 (1708), a factor had sold his principal's goods to a third party, and had died insolvent. The goods were unpaid for, and the debt of the purchaser for those goods was in equity subjected as trust-property to the claim of the principal, following the theory that the debt was the product of the goods. The good principle was here asserted, that if the owner can distinguish his property *or its proceeds* from the property of the insolvent factor, he may follow and hold either. The case involves the assumption that a separate and distinct chose in action, as a debt, may thus be distinguished from the factor's other property. So, again, in Whitecombe v. Jacob, 1 Salk. 160 (1711), a factor for sale had sold his principal's goods, and had invested the proceeds in other goods, which he had on hand at his death. He died insolvent, and indebted by specialty debts. It was held in equity that the last-named goods were the property, not of the factor, but of the principal, they being the fruit or product of his property. The supposed difficulty of following such proceeds, if they exist in specie as money in the factor's hands, had at this early day presented itself to the court, which

said: "But if the factor have the money, it shall be looked upon as the factor's estate, and must first answer the debts of a superior creditor, etc., for in regard that money has no ear-mark, equity can not follow that in behalf of him that employed the factor." This dictum must clearly be understood to refer to the mingling by the factor of the particular proceeds with a mass of other moneys. The idea is more clearly expressed in Scott v. Surman, Willes, 400 (1742), where relief was given, in an action at law, as to notes which were the proceeds of the goods of the principal, in the hands of the assignees in bankruptcy of an insolvent factor. The court here took pains to say: "We are all agreed that if the money for which the tar had been sold had been all paid to the bankrupt before his bankruptcy, and had not been laid out again by him in any specific thing to distinguish it from the rest of his estate, in that case the plaintiffs could not have recovered anything in this action, but must have come in as creditors under the commission, as is laid down in the case of Whitecombe v. Jacob, 1 Salkeld, 161. But the reason of this is so very plain that I need not cite any other, because money has no ear-mark, and therefore can not be followed."

The principle of these cases was not only followed and approved, but their results were well summarized in Ryall v. Rolle, 1 Atk. 172, (1749). Burnet, J., said: "Suppose goods are consigned to a factor, who sells them and breaks, the merchant for the money must come in as a creditor under the commission; but if the money is laid out in other goods, these goods will not be subject to the bankruptcy. 1 Salk. 160. Suppose, instead of selling the goods for ready money, he sells for money payable at a future day, and breaks before the day; if the assignees receive the money, it will be for the use of the merchant. Or, suppose that the factor had taken notes for the goods; if his assignees receive the money upon these notes, it will be to the merchant's use. This was determined in the court of common pleas. Surman v. Scott, Hil. 16 Geo. 2 (Willes, 400)."

In the familiar case of Taylor v. Plumer, 3 Maule & S. 562, the rule was enforced under new circumstances by the Court of King's Bench, in 1815. There the funds of a principal, in bank bills, entrusted to his agent, had been invested by the latter in bank shares, United States stocks and bullion, and he then absconded. The principal having recovered the last-named property from his agent, after the commission by the latter of an act of bankruptcy, was sued in trover by the assignees of the bankrupt. Lord Ellenborough held that the property, in its new form, was still the property of the principal, notwithstanding the change, and that he had rightfully recovered what was his own, and said: "An abuse of trust can confer no rights on the party abusing it, nor on those in privity with him." Again: "It makes no difference, in reason or law, into what other form, different from the original, the change may have been made—whether it be into that of promissory notes for the security of the money which was produced by the sale of the goods of the principal, as in Scott v. Surman, Willes, 400, or into other merchandise, as in Whitecombe v. Jacob, Salk. 160; for the product of, or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail." (P. 575.) He also cited the very pointed *dictum* of Lord Mansfield, in a note in 3 Burr. 1369, uttered in 1763, that "if an executor become bankrupt, the commissioners can not seize the specific effects of his testator; not even in money, which specifically can be distinguished and ascertained to belong to such testator, and not to the bankrupt himself."

Lord Ellenborough, with his predecessors above referred to, thought that the "means of ascertainment" would fail "when the subject is turned into money, and mixed and confounded in a general mass of the same description," though he did not propose that each individual coin or bill must be marked to be followed. "The difficulty which arises in such case," he said, "is a difficulty of fact, and not of law, and the dictum that money has no ear-mark must be understood in the same way, *i. e.*, as predicated only of an undivided and undistinguishable mass of current money; but money in a bag, or otherwise kept apart from other money, guineas or other coin, marked (if the fact were so), for the purpose of being distinguished, are so far ear-marked as to fall within the rule on this subject." Lord Mansfield had said, on this point, in 1758 (Miller v. Race, 1 Burr. 457), that the true reason why money can not be followed is not that it has no ear-mark; "the true reason is on account of the currency of it; it can not be recovered after it has passed in currency."

The difficulty of identification which thus in imagination confronted Lord Ellenborough and other judges before him, actually presented itself for solution to the Lords Justices, sitting in appeal in chancery, in the later case of Pennell v. Deffell, 23 Eng. L. & E. 460, 4 De G. M. & G. 372 (1853). This difficulty was solved by a logical application of the principles which had been already established in the cases above referred to. The case was a contest between the successors in trust of a deceased assignee in bankruptcy, and his executors, in equity, over funds deposited in bank by the deceased in his individual name, but claimed to belong to several estates in bankruptcy. These deposits were in part identified as having arisen from the bankrupt estates. The agent had plainly mixed the trust-moneys with his own, by depositing them in his own name; and the commingling of the moneys into an inseparable mass, in the coffers of the bank, was beyond question. But the court, by most ingenious yet sound logic, holds the bank account itself, as a chose in action, to be an independent thing, which is partly the product of trust funds, and may, therefore, be subjected as trust property *pro tanto*. The bank account is compared to a box or chest into which the trust-moneys are

placed, with other and individual moneys, all, it may be, irretrievably mixed, and the fund depleted, it may be, by subsequent withdrawals; but so long as any moneys are found in the receptacle, not in excess of the trust funds, equity will impress on them the trust character. The act of a trustee in thus confounding the two kinds of property will not be allowed to prejudice the rights of an innocent owner or *cestui que trust*. The commingling of moneys in a common mass is held not to impede the recovery of the trust funds, so long as a portion of that mass can be identified as the substantial and equitable product of such trust funds, notwithstanding the continuous transmutations to which they may have been subjected in that mass may not be separable or distinguishable. The court finds an apt illustration in the tracing of the capital of a deceased partner through the permutations of the trade carried on by the surviving partners, who have retained improperly that capital, and thus have made themselves trustees—a case said to be of familiar, almost daily occurrence, and one offering no serious obstacles to a court of chancery. "The very capital itself may consist only of the balance which, at the death of the partner, was due to him as the result of the partnership account. That capital may have no existence but in the stock in trade and debts of the partnership. The stock in trade and debts may undergo a continual course of change and fluctuation; and yet this court follows the trust capital through all its ramifications, and gives to the beneficiaries of the deceased partner's estate the fruits derived from that capital, so continually altered and changed."

This case, and that of Taylor v. Plumer, seem to have settled the law in England, so far as it can be settled, in view of the multiform character which new cases may be expected to assume as they arise. The late case of *Re* Strachan, in the court of appeal in chancery (referred to in 9 Chic. L. News, p. 111), allowed a principal to follow into, and recover from the bank account of his broker, who was insolvent, the proceeds of stock sold by the latter as a broker. This case exhibited the additional circumstance that the principal himself was a trustee, and the stock was trust-stock in his hands. But this fact could only serve to show more clearly the trust character of the property. So far as the identification and the following of the property are concerned, the case is fully within the principles of the two cases above referred to.

It is obvious that no two cases calling for the application of these principles are likely to be precisely similar. But we may safely take as a rule (though, perhaps, negative rather than affirmative in form), the following extract from Pennell v. Deffell: "As between *cestui que trust* and trustee, and all parties claiming under the trustee, *otherwise than by purchase for valuable consideration without notice*, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property,—whether in its original or altered state,—continues to be subject to, or affected by the trust." 4 De G. M. & G. 388. And that it is only a purchaser for valuable consideration without notice, who can escape the operation of the rule, is laid down in 2 Fonblanque's Eq., *p. 167; Story's Eq. Jur., § 1264; Perry on Trusts, § 828, and is also plainly held in the case of Brocchus v. Morgan, *supra*.

In our next number attention will be invited to the American cases on the same subject.

J. O. P.

FOLLOWING TRUST PROPERTY.

BROCCHUS v. MORGAN.

Supreme Court of Tennessee, September Term, 1875.

HON. JAMES W. DEADERICK, Chief Justice.
" PETER TURNEY,
" THOS. J. FREEMAN,
" ROBERT MCFARLAND,
" J. L. T. SNEED,
} Associate Justices.

A trust fund may be followed into and out of a deposit in a bank, of which it has formed a part, and thence into the hands of a receiver for creditors of the partners who were the trustees; and the *cestui que trust* may recover it in equity from the receiver.

NICHOLSON, C. J., delivered the opinion of the court:

On the 25th day of June, 1869, Thos. and E. F. Brocchus went to the commission house of John McClennan & Co., in Memphis, and placed in the hands of their book-keeper, R. B. Hawley, five packages of national currency, each containing $500, to be safely kept by the firm for a few days. Hawley executed receipts to them for their respective amounts, in the name of John McClennan & Co., and placed the money in the iron safe. About this time McClennan came in and was informed by Hawley of the fact that he had received the money on deposit. McClennan being dissatisfied, Hawley suggested that they could deposit the money in the First National Bank in Memphis, and it would swell their bank account. McClennan agreed to this, and thereupon, on the same day, Hawley deposited the $2,500 in the First National Bank, in the name of John McClennan & Co., and had the same entered as a credit on their bank or pass-book. In a few weeks afterwards McClennan died, and on the 7th of September, 1869, one of the surviving members of the firm checked out all the deposits then remaining, to the credit of the firm, amounting to $4,216, in which amount was included the amount due on the deposit of $2,500, made by Hawley on the 25th of June. After this money was so collected, it passed into the hands of J. B. Hill, who holds it as receiver of the assets of the firm. The question raised upon these facts, is, whether Thos. and E. F. Brocchus are entitled to recover the money in the hands of Hill, to the amount of $2,500, or whether the money is to be distributed among the general creditors of the firm of John McClennan & Co.?

It is fully shown by the proof that the two Brocchuses left with John McClennan & Co. $2,500, for safe keeping for a few days, with the expectation and understanding that it would be kept in their safe, and not be used. It is further proved that, in violation of this arrangement, the money, with the consent of McClennan, was deposited in the bank, in the name of McClennan & Co. There can be no dispute that, when the money was deposited in the bank, it was the money of the Brochuses. They do not seek to follow it into

the bank; they insist that when mingled with the other money of the bank, by the general deposit, the bank thereby became their debtor for that amount, and that this indebtedness was evidenced by the entry of the credit on the pass-book of McClennan & Co. They claim that they, and not McClennan & Co., were the owners of this evidence of indebtedness. We think the facts sustain these positions, and show that McClennan & Co. held the evidence of the deposit and consequently of the debt due from the bank, as the trustee of the Brocchuses, so constituted by the illegal conversion of their money into this chose in action. But the bank paid off and satisfied this debt, upon the check of one of the surviving members of the firm of McClennan & Co., and from that time ceased to be debtor, either to the Brocchuses or to McClennan & Co., for the $2,500 deposit. The money so checked out of the bank by one of the surviving members of the firm of McClennan & Co., in satisfaction of the deposit of $2,500, made on the 25th of June, 1869, is now under the control of the court, in the hands of Hill as receiver, who insists that it is part of the assets of the firm of McClennan & Co. of which he is receiver, and subject to distribution among their general creditors.

We are unable to see any principle of law or equity on which the general creditors of McClennan & Co. can found a claim to this money. That firm received $2,500 from the Brocchuses as bailees, and in violation of the trust reposed in them, and for the purpose of swelling their bank account, they converted the fund by loaning it to the bank. Afterwards this amount of money is received by them in satisfaction of the indebtedness of the bank created by the deposit. How can the money received by McClennan & Co. in satisfaction of that amount of the money of the Brocchuses, wrongfully used by them, be now said to be any more their money than it was when they made the deposit? The Brocchuses had the election to hold McClennan & Co. responsible for the conversion of their money, or to claim that the indebtedness of the bank, evidenced by their pass-book, belonged to them. They have elected to seek satisfaction out of the proceeds of that indebtedness, now in the hands of their receiver. No question arises here as to the rights of a *bona fide* purchaser without notice. The money collected from the bank by one of the surviving partners of the firm of McClennan & Co., has never passed into the hands of an innocent purchaser, but the same money is in the hands of the receiver of the assets of that firm.

The rule of law governing the case is laid down with clearness, by Mr. Story, in sec. 229 of his work on Agency. He says: "If an agent has converted the property of his principal into, or invested it in other property, and it can be directly traced, the principal may follow it wherever he can find it, and as far as it can be thus traced, subject, however, to the rights of a *bona fide* purchaser for a valuable consideration without notice. It will make no difference in law, as indeed it does not in reason, what change of form different from the original the property may have undergone, whether it be changed into promissory notes or other securities or into merchandise, or into stock, or into money. For the product of the substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such: and the right only ceases when the means of ascertainment fails." See Moffatt v. McDonald, 11 Hum. 460; 2 Story Eq., § 1258; 1 Perry Trusts, § 463. It is laid down in the last named authority, that if a trustee deposit trust money with his own money, in a bank, in his own name, the withdrawal of part by the trustee will not defeat the right of the *cestui que trust*. The rule to be applied in such case is, that the checks are to be applied to the earliest items of deposit, whether of the fund or of the trustee's own money, and such earliest items will be reduced *pro tanto*. If anything of the trust fund remains in the hands of the banker, under this rule, it will be applied to the purposes of the trust. This is a rule for the protection of the *cestui que trust* in case of the failure or bankruptcy of the trustee. These authorities establish the doctrine, that, when a trustee deposits the funds of his *cestui que trust* in a bank in his individual name, and thereby mingles them with his own funds, the *cestui que trust* may proceed against him for the conversion; but if he be insolvent, the *cestui que trust* may have satisfaction out of whatever funds may be found in the bank to his credit, which appears by the dates of the deposits and the checks to be the trust funds so converted. Hence, the Brocchuses might have subjected the fund in the bank upon this rule, if they had proceeded before the trustee had withdrawn it all from the bank. So long as the funds so withdrawn remain in the hands of the trustee, it continues to be subject to be reached by the *cestui que trust*, because it is identified as the proceeds of the original trust fund converted. The same principle was announced by Judge Story in the case of Thompson v. Perkins, 3 Mass. 232, in which he said: "Nothing is better settled at the present day, than the doctrine that the principal is entitled to recover whenever he can trace his own property and distinguish it or its proceeds from the mass of property of his factor." And he added with much force: "Upon reason, upon the nature of the contract, upon general justice and equity, the produee of the property ought to belong to the owner if it is distinguishable from that of the factor."

The correctness of Judge Story's concluding remark is fully illustrated by the facts of the case before us. It is a contest between the general creditors of an insolvent firm and complainants, as to the disposition of a fund which was clearly the property of complainants, and still so continues until it has ceased to be theirs by the wrongful act of the firm in appropriating it in violation of the trust reposed in them. If complainants have lost their title to the money, it has been by the operation of a highly technical rule of law, and one so liable to result in injustice, that courts of equity have been compelled to recognize exceptions to it for the purpose of attaining justice. We think the present case falls within one of these well recognized exceptions, which enables us to avoid a gross wrong to complainants, and which works no injustice to the general creditors, who are only entitled to share in the assets which belonged honestly to their debtors. 1 Story Eq. Jur. §§ 468, 623; Whitly v. Foy., 6 Jones Eq., 34.

The decree of the chancellor will be reversed, and a decree entered here for complainants in accordance with this opinion.

The costs will be paid by the receiver out of the funds in his hands.

LIABILITY OF SLEEPING-CAR COMPANIES.

PULLMAN PALACE CAR CO. v. SMITH.*

Supreme Court of Illinois, June Term, 1877.

HON. JOHN M. SCOTT, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" JOHN SCHOLFIELD,
" PINCKNEY H. WALKER,
" BENJAMIN R. SHELDON,
" ALFRED M. CRAIG,
} Associate Justices.

1. SLEEPING CARS—PROPRIETORS OF, NOT LIABLE AS INNKEEPERS.—The owners of sleeping-cars, who receive

* From the advance sheets of 73 Illinois.

pay in advance from lodgers merely for the sleeping accommodation afforded by their cars, and this only from a particular class of persons, and for a particular berth, and for a particular trip, are not liable as innkeepers for money that may be stolen from the person of such lodgers on their cars.

2. PROPRIETORS OF, NOT LIABLE AS CARRIERS.—The proprietors of sleeping cars who only furnish sleeping accommodations for travelers, who have paid for their transportation to the railroad company over whose road the sleeping car runs, no part of which pay for transportation is received by the owners of the sleeping cars, are not carriers, and can not be held liable as such for property lost by or stolen from lodgers whilst on their cars.

Appeal from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding:

This was an action brought by Chester M. Smith, appellee, against the Pullman Palace Car Company, appellant, for the recovery of $1180, claimed to have been lost from the Pullman sleeping-car Missouri, on the night of December 17, 1872, under the following circumstances: On the afternoon of December 17, 1872, appellee started from his home in Oconomowoc, Wis., for a point in Missouri, Southwest of St. Louis, for the purpose of buying horses and mules. He purchased a ticket through to St. Louis, via the Milwaukee and St. Paul Railway to Chicago, thence to St. Louis over the Alton and St. Louis Railway, for which he paid $15.25. He arrived at Chicago about eight o'clock in the evening of the same day, went to the office of appellant and bought a sleeping-car ticket from Chicago to East St. Louis, for which he paid the sum of $2, and took a berth in the Pullman car, which left Chicago for St. Louis at nine o'clock P. M. His money, $1180, was in an inside vest pocket, and when he retired for the night the vest was placed under his pillow; in the morning he found the vest as he left it, but the money was gone.

On behalf of the Pullman Palace Car Company, it appeared that they have no place to store valuables, and that their agents are instructed to receive no parcels, valuables, or money, and receive no pay for baggage or valuables of any kind, but only to take pay for the occupancy of the berths; and that they do not receive packages, valuables or money from passengers on the car to take charge of. Upon the back of their checks, which are given when the tickets are taken up, is printed the following: "Wearing apparel or baggage, placed in the car, will be entirely at the owner's risk." They receive into their cars only those who have a first-class passage ticket, or a proper pass from the railroad company· passengers secure their berths for a particular trip and for a particular berth and car, paying in advance. The company has no interest in the fare paid by the passenger to the railroad company for transportation, and the railroad company has no interest in the prices paid the Pullman Palace Car Company for berths; the latter receive pay for sleeping accommodations—none whatever for transportation.

The court below gave the following instruction to the jury:

"If the jury believe, from the evidence, that the plaintiff, while sleeping in the defendant's car, on the trip from Chicago to Alton, was robbed of a sum of money which he there had with him, then the verdict should be in his favor for the sum of which he was so robbed, unless the same was greater than would be an ordinary and reasonable sum for a traveler to carry with him for traveling expenses only, upon such a journey as the plaintiff was then upon his return home; in which case he should only recover such ordinary and reasonable sum, to which the jury may, if they think proper, add interest at six per cent. for fourteen months."

The jury returned a verdict for the plaintiff for $277, upon which judgment was rendered, to reverse which the Pullman Palace Car Company bring this appeal.

Messrs. Walker, Dexter & Smith, for the appellant; *Messrs. Shufeldt, Ball & Westover*, for the appellee.

Mr. Justice SHELDON delivered the opinion of the court:

The instruction which the court gave to the jury made the company responsible as insurer for the safety of the money, imposing upon it the severe liability of an innkeeper or common carrier. And it is the position which appellee's counsel take, that the relation between the parties in this case was that of innkeeper and guest, and that the liability of the company is that of an innkeeper.

In order to ascertain whether the extraordinary responsibility claimed, here exists, it becomes important to inquire into the nature of inns and guests, where this liability was imposed by the common law, and see whether the description of the same properly applies here. Kent, in defining inn, says: "It must be a house kept open publicly for the lodging and entertainment of travelers in general, for a reasonable consideration. If a person lets lodgings only, and upon a previous contract with every person who comes, and does not afford entertainment for the public at large, indiscriminately, it is not a common inn." 2 Kent Com. 595. This is substantially the same definition as is given in all the books upon the subject. But the keeper of a mere coffee-house, or private boarding or lodging-house, is not an innkeeper, in the sense of the law. Id. 596; Dansey v. Richardson, 3 Ellis & B. 144 (E. C. L., vol. 77); Holder v. Toulby, 98 E. C. L. 254; Kisten v. Hilderbrand, 9 B. Munroe, 72. It must be a common inn, that is, an inn kept for travelers generally, and not merely for a short season of the year, and for select persons who are lodgers. Story on Bailm., sec. 475, and cases cited in note. The duty of innkeepers extends chiefly to the entertaining and harboring of travelers, finding them victuals and lodgings, and securing the goods and effects of their guests; and, therefore, if one who keeps a common inn refuses either to receive a traveler as a guest into his house, or to find him victuals and lodging, upon his tendering him a reasonable price for the same, he is not only liable to render damages for the injury in an action on the case, at the suit of the party grieved, but also may be indicted and fined at the suit of the king. 3 Bac. Ab. Inns and Innkeepers, C. The custody of the goods of his guest is part and parcel of the innkeeper's contract to feed, lodge and accommodate the guest for a suitable reward. 2 Kent Com. 592.

From the authorities already cited, it is manifest that this Pullman Palace Car falls quite short of filling the character of a common inn, and the Pullman Palace Car Company that of an innkeeper.

It does not, like the innkeeper, undertake to accommodate the traveling public, indiscriminately, with lodging and entertainment. It only undertakes to accommodate a certain class — those who have already paid their fare and are provided with a first-class ticket, entitling them to ride to a particular place. It does not undertake to furnish victuals and lodging, but lodging alone, as we understand. There is a dining-car attached to the train, as shown, but not owned by the Pullman Company, nor run by them. It belongs to another company, the Chicago and Alton Dining-Car Association. Appellant, as we understand, furnishes no accommodation whatever, save the use of the berth and bed, and a place and conveniences for toilet purposes. We would not have it implied, however, that even were these eating accommodations furnished by appellant, it would vary our

decision; but the not furnishing entertainment is a lack of one of the features of an inn.

The innkeeper is obliged to receive and care for all goods and property of the traveler which he may choose to take with him upon the journey. Appellant does not receive pay for, nor undertake to care for any property or goods whatever, and notoriously refuses to do so. The custody of the goods of the traveler is not, as in the case of the innkeeper, accessory to the principal contract to feed, lodge and accommodate the guest for a suitable reward, because no such contract is made. The same necessity does not exist here as in the case of a common inn. At the time when this custom of an innkeeper's liability had origin, wherever the end of the day's journey of the wayfaring traveler brought him, there he was obliged to stop for the night, and intrust his goods and baggage into the custody of the innkeeper. But here, the traveler was not compelled to accept the additional comfort of a sleeping car; he might have remained in the ordinary car; and there were easy methods within his reach by which both money and baggage could be safely transported. On the train which bore him were a baggage and express car, and there was no necessity of imposing this duty and liability on appellant.

It can not be supposed that any such measure of duty or liability attached to appellant, as is declared in the quotation cited from Bacon's Abridgement to belong to an innkeeper. The accommodation furnished appellee was in accordance with the express contract entered into when he bought his berth ticket to Chicago, which was for the use of a specified couch from Chicago to St. Louis, and appellant did not render a service made mandatory by law, as in the case of an innkeeper.

But if it should be deemed that, on principle merely, this company would be required to take as much care of the goods of a lodger, as an inkeeper of those of a guest, the same may be said with reference to the keeper of a boarding-house, or a lodging-house. In Dansey v. Richardson, *supra*, where the innkeeper's liability was refused to be extended to a boarding-house keeper, it was said by Coleridge, J.: "The liability of the innkeeper, as, indeed, other incidents to his position, do not, however, stand on mere reason, but on custom, growing out of a state of society no longer existing." In Holder v. Toulby, *supra*, where it was held the law imposed no duty on a lodging-house keeper to take due care of the goods of a lodger, Calye's case, 8 Co. Rep. 32, was designated as *fous juris* upon this subject, where it was expressly resolved that, though an innkeeper is responsible for the safety of the goods of a guest, a lodging-house keeper is not. And in Parker v. Flint, 12 Mod. 255, "If," says Lord Holt, "one come to an inn and make a previous contract for lodging for a set time, and do not eat or drink there, he is no guest, but a lodger, and, as such, is not under the innkeeper's protection; but if he eat or drink there it is otherwise, or if he pay for his diet there, though he do not take it there."

The peculiar liability of the innkeeper is one of great rigor, and should not be extended beyond its proper limits. We are satisfied that there is no precedent or principle for the imposition of such a liability upon appellant.

Appellant is not liable as a carrier. It made no contract to carry. Appellee was being carried by the railroad company; and if appellant was a carrier, it would not be liable for the loss in this case, because the money was not delivered into the possession or custody of appellant, which is essential to its liability as carrier. Town v. The Union and Schenectady Railroad Co. 7 Hill, 47. In 2d Vol. Redf. Am. Railw. Cases, 138, it is said: "But it has never been claimed that the passenger carrier is responsible for the act of pickpockets at their stations, or upon steamboats or railway carriages."

It would be unreasonable to make the company responsible for the loss of money which was never intrusted to its custody at all, of which it had no information, and which the owner had concealed upon his own person. The exposure to the hazard of liability for losses by collusion, for pretended claims of loss where there would be no means of disproof, would make the responsibility claimed a fearful one. Appellee assumed the exclusive custody of his money, adopted his own measures for its safe-keeping by himself, and we think his must be the responsibility of its loss.

We hold the instruction to be erroneous, and the judgment of the court below will be reversed, and the cause remanded.

JUDGMENT REVERSED.

NOTE.—See also Blum v. Southern Pulman Palace Car Co., 3 Cent. L. J. 591.

FORECLOSURE OF RAILWAY MORTGAGE.

FARMERS' LOAN AND TRUST CO. v. CENTRAL R. R. CO., OF IOWA.*

United States Circuit Court, District of Iowa, May Term, 1877.

Before HON. JOHN F. DILLON, Circuit Judge, and HON. JAMES M. LOVE, District Judge.

1. SALE OF RAILROAD UNDER FORECLOSURE—COURT WILL NOT INTERFERE WITH DISCRETION OF TRUSTEE.—Where a decree of foreclosure under a deed of trust conveying a railroad, etc., to secure certain bonds, has been obtained in the name of the trustee for all the bond-holders, a court of equity will not, at the instance of certain bond-holders, direct the trustee to execute the decree and sell the road at once; but will leave the trustee to the exercise of his discretion.

2. THE REMEDY OF THE BOND-HOLDERS in such case is to apply to have the trustee removed and in that way get a trustee who will execute their wishes.

Charles Alexander and others, holders of first mortgage bonds of the Central Railroad of Iowa, default having been made in payment of interest, requested the trustee to foreclose. The trustee failed to institute proceedings to foreclose, and thereupon Alexander and others brought suit therefor and made the trustee a party thereto. A demurrer to the bill of foreclosure, on the ground that only the trustee could bring suit, was overruled. The trustee then asked and obtained permission to file a bill to foreclose, and upon filing such bill, the action was consolidated with that by Alexander and others. A final decree was rendered in name of trustee, at October term, 1875. Certain other bondholders, Sage, Cowdrey *et al.*, having been allowed to intervene, were granted an appeal to the Supreme Court of the United States. They perfected the appeal, but failing to give bond in proper time or amount, the *supersedeas* was discharged. Sage *et al.* v. Railroad, 3 Otto, 412. Thereupon a certain committee of bondholders asked the trustee to order the special master to proceed with execution of decree, make sale of the road, etc. The trustee failing to do this, the committee directed the master to sell, claiming the right so to direct, under equity rules 8 and 10. This the master refused to do. Thereupon the trustee petitioned the court for advice in respect to ordering the sale; and the committee of bondholders moved for an order directing the trustee and master to execute the decree. The matters were heard at Chambers in Davenport, March, 1877.

* Reprinted from the Western Jurist.

John Turner, of New York, for trustee; *R. L. Ashhurst*, of Philadelphia, for committee.

In the matter of the petition of the said complainant for advice and direction in respect to making a sale under the decree, and the application of certain bondholders for an order on the special master to make a sale.

DILLON, Circuit Judge:

I. I am of opinion that individual bondholders, not parties to the record, and who are represented by the trustee, have no legal right to demand that the trustee shall order a sale under the decree, and have the same executed, if the trustee is of opinion that the interest of all the bondholders would be best subserved by not having a sale made pending the appeal.

II. The question whether a sale should be made under the decree pending the appeal, is one which primarily belongs to the trustee to determine, having in view the interest of all the *cestuis que trust*. That question the trustee, by the petition, refers to the court. Under the circumstances, I am of opinion the court ought not to order the trustee to cause a sale to be made at the present time; such is also the opinion of Judge Love, hereto annexed, and in which I concur. An order can be made on the foregoing petitions in conformity with these views, and the special master will cause the order to be entered of record, and the respective counsel to be notified hereof. We decide the matter now, so as to enable the parties who desire a sale to apply to the supreme court at this term for a mandamus to compel the execution of this decree, if they shall so desire.

LOVE, J.:

I have gone carefully over the papers, and given them the best consideration I could. I proceed to give you my impressions as to the disposition which ought to be made of the case: I have a very decided opinion that the court ought not at present, and upon the showing made by the majority of the bondholders, to order the trustee to execute the decree.

The case is a peculiar one. The Circuit Court did not enter the decree upon any independent consideration of the rights and equities of the parties, but solely upon the assumption that the parties to be affected by it assented to the provisions of the decree. Now, it turns out that this assumption was not well founded, so far as the appellants, who are now resisting the exeution, are concerned. The appellants are consequently seeking to get the decree reversed. It must be borne in mind that they have never yet had the judgment of any court upon their rights and equities under the mortgage. If the court had passed its independent judgment upon their rights and equities, and had made a decree disposing of them accordingly, and if they had failed to supersede the decree, I no not see that they would have any reason to complain, even though they could not, in the event of a reversal, be placed, as to their rights under the mortgage, *in statu quo*. But in the absence of any real adjudication by the court, and by virtue of a consent decree to which they were not parties, to have the property in which they are interested disposed of, so that in the event of a reversal they can not be awarded the very relief to which they would be entitled by the terms of the mortgage, would seem to me not at all in accordance with the principles of equity.

Again, it is impossible for us to know what the decision of the supreme court will be, and what complications may consequently arise from the execution of the decree in the meantime. Will the supreme court dispose of the case with reference to the fact that the decree below has been executed, and the trust property placed beyond judicial control, or will it determine the controversy with reference to the state of the case and property at the time when the decree was entered below? I confess I do not see the way clear in the future, if the *status quo* of the trust property be changed, as required by the terms of the decree. On the contrary, it appears to me that no complications can possibly arise if the decree be not executed. Nor can I see clearly that any special injury will result to the parties in interest, by reason of the delay. If the majority feel aggrieved by the refusal of the court to grant their present motion, I suppose they have their remedy; they can apply for a mandamus, and thus submit their case to the judgment of the supreme court, and if it be a matter of right in them, and not of discretion in the circuit court, they can thus obtain redress.

Afterward, and at the May term, the application was renewed by Alexander and others, original complainants and bond-holders, and the following opinion was announced, reported by a short-hand reporter:

C. C. Cole, for the application; *Grant & Smith*, *contra*.

DILLON, Circuit Judge, in orally denying the application to compel the trustee to sell the road under the decree, said:

Mr. Alexander, and certain other bondholders, apply here for an order on the trustee, the complainant in this case, in whose favor a decree was rendered, directing the trustee to sell the road under the decree of the court heretofore rendered. That matter has been very fully argued in favor of the application by Judge Cole, and the trustee appears by its attorneys of record, and submits the matter on its part for the consideration of the court. This is in reality a renewal of a similar application which was made and considered by Judge Love and myself last winter at Chambers. At that time we denied the application, and decided it promptly, so as to enable the parties, if dissatisfied with our judgment in the premises, to apply to the supreme court for a mandamus directing us to execute that decree. The facts are these in brief: Originally Mr. Alexander, and certain other bondholders, commenced this action of foreclosure in their own names, making the trustee a party defendant, on the ground that the trustee had improperly refused to execute the trust. Subsequently the trustee came in and was made complainant, and the case of the individual bondholders was consolidated with that one, and thereafter the cause was prosecuted in the name of the trustee, taking no notice of the rights of Mr. Alexander, or the other individual bondholders.

Under a railway mortgage, where it is contemplated that bonds to a large number will be executed and negotiated, and where the holders of these bonds may be scattered over the whole face of the earth, it becomes very important to appoint a trustee, and the trust deed for that purpose usually prescribes the powers and duties of the trustee; and it is so in this case. Now, all the purchasers of these bonds must take under the rights which that instrument gives them, and the effect of this is that the trustee, while acting in the line of his duty, and within the scope of his powers, is a representative of all the bondholders, so that when the trustee in this case procured a decree of foreclosure, he procured it for the equal benefit of all. The court can not entertain the application of specific bondholders, except where they come in and represent, and make a case, showing that the trustee is guilty of a breach of trust, or neglect of duty. Such proceedings were had that the court ordered a decree of foreclosure for the trustee, for the benefit of all the bondholders. Subsequently two or three of the bondholders — Sage, Cowdrey and Buell—were allowed an appeal to the supreme court, and the appeal was directed by Mr. Justrice Miller, to operate as a supersedeas.

Afterwards, in the supreme court, the supersedeas was set aside, but the appeal was entertained, and is still pending in that court. While that appeal is pending, an application was made to order the special master to make a sale of the road, which was considered by Judge Love and myself. That application was refused. The parties went before the supreme court on an application for mandamus to compel us to execute the decree, by a sale of the road, under it, and that application was refused. We have not seen the opinion of the supreme court, if one was written, but Judge Miller states to us distinctly, that it was refused on the ground that this trustee was the representative of all bondholders—that it was for him to determine whether the best interests of all concerned would be promoted by a sale of the road, and that no single bondholder, nor any number of individual bondholders, had a *legal right* to insist upon an execution of the decree. And he says furthermore, that the supreme court is very strongly of opinion that the individual bond-holders ought not to be allowed to become parties to the record in railway foreclosure cases, unless upon strong and clear reasons, for good cause. Their number is legion. One may want this done, another may want that done; and such is the case here. The majority of the bondholders want a sale of the road, but a very large number in amount oppose that sale. Now, it is for the trustee to determine whether that sale ought to be made. And Judge Miller also states that the supreme court is of opinion that, if these bondholders do not like the trustee, and are dissatisfied, their remedy is to apply to have him removed, under the provision in that behalf contained in the trust deed, and get a trustee to carry out their wishes, if they can.

So far as this case is concerned, we think that what the supreme court has decided is conclusive against the *legal* right of these parties now applying to have this decree executed but at the same time we wish to; say, for the guidance of the trustee, that there is no restraint in the decree, or in what has been decided in either court against its execution, and that the appeal does not supersede it, and that he is at perfect liberty, whenever it sees fit, to execute that decree. As far as the court is concerned, considering the trouble this road gives us, by reason of the controversies and factions among the bond-holders, we would be glad if the trustee could see its way clear to execute that decree, and would be glad if he could get the road out of court, and into the hands of parties who could control it to their satisfaction.

As far as the suggestion is made that the trustee incurs any personal liability in so doing, we think there is nothing in that. It comes to this, and we want the trustee to understand that, as far as we can see, he incurs no personal liability by executing the decree. There is simply this question for the trustee to determine, whether the best interests of all the *cestuis que trust*, or bondholders, would be best promoted by now executing the decree, or by allowing it to stand until the determination of the appeal.

We, therefore, are obliged, in conformity with what we heretofore decided, and for the reasons here stated, and in conformity with the opinion of the supreme court, as we understand it through Mr. Justice Miller, to refuse this application.

LOVE, J., concurred.

THE vacancy in the English Court of Appeal, caused by the death of Mr. Justice Mellish, has been filled by the appointment of Mr. Henry Cotton, Q. C. The new justice was called to the bar in Hilary term, 1846, and became an equity drafteman and conveyancer. In 1866 he was made a Queen's Counsel, and selected the court of Vice-Chancellor Malins, where he has since practiced.

COMMON CARRIERS—LIMITING LIABILITY.

BOSKOWITZ *ET AL.* v. THE ADAMS EXPRESS COMPANY.

Supreme Court of Illinois, January, 1877.

HON. JOHN M. SCOTT, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" JOHN SCHOFIELD,
" PINCKNEY H. WALKER,
" BENJAMIN R. SHELDON,
" ALFRED M. CRAIG,
} Associate Justices.

Plaintiff delivered three bales of furs, worth seven thousand dollars, to the defendants at Chicago, for transportation to New York, taking a receipt therefor in which it was stipulated that the company should not be held for any loss or damage except as forwarders only, nor for any loss or damage of any box, package or thing, for over fifty dollars, unless the just and true value thereof should be stated in the receipt. No value was stated in the receipt. The furs were lost through the failure of a railroad company employed by defendant to carry them, to provide its cars with the most approved platform then in use. *Held* (1.), that, while the defendant could, by express contract, relieve itself of its liability as an insurer, it could not so relieve itself of its liability for its own negligence or that of a railroad company employed to carry its freight; (2.) that the railroad company in question was guilty of negligence is not adopting and using the most approved platform then in use, and that defendant was liable for the value of the furs destroyed on account of such default; (3.) that to avail itself of the limitation upon its liability contained in said receipt to any extent, the defendant must show *by the most satisfactory evidence* that the terms of the receipt were comprehended and assented to by the shipper.

APPEAL from the Superior Court of Cook County.

BREESE, J., delivered the opinion of the court.

This was *assumpsit* in the Superior Court of Cook County by Ignatz and Adolph Boskowitz, plaintiffs, and against the Adams Express Company, defendants, on their common law liability as common carriers.

Under the rulings of the court, the plaintiffs had a verdict for fifty dollars, which they moved to set aside and for a new trial, which motions were denied, and judgment rendered on the verdict, to reverse which the plaintiffs appeal.

The action was brought to recover the value of three bales or packages of furs, fine and coarse, delivered to the company to be transported by them from Chicago to the City of New York, which were worth in Chicago seven thousand, five hundred dollars, and in the latter city, about eight thousand dollars. Two bales of fine furs were each about thirty inches high and thirty-six inches in width and the same in length—one bale of coarse furs was larger. They were properly marked and directed to I. and A. Boskowitz, New York City, and the freight charges paid. The goods were never delivered to the consignees.

By the common law, the liability of the defendants was fixed by proof of these facts. But the company insist they had the right to limit this common law liability by express agreement, and this they allege they did do, by the receipt given to the plaintiff at the time of the shipment of the goods. This right, by repeated decisions of this and other courts, must be accorded to the company in all cases where the agreement is fairly and understandingly made. The agreement couched in the receipt is to the effect that the company shall not be held for any loss or damage, except as forwarders only, nor for any loss or damage of any box, package or thing, for over fifty dollars, unless the just and true value thereof is stated in the receipt.

In Adams Express Company v. Haynes, 42 Ill. 89,

and in subsequent cases, it was held, where an express company, in receiving goods for transportation as a common carrier, gives a receipt for the goods containing provisions limiting the common law liability of the company, and the shipper accepts the receipt with a full knowledge of its terms, and intending to assent to the restrictions contained in it, it becomes his contract as fully as if he had signed it. But it was further held, the simple delivery of such a receipt to the shipper is not conclusive upon the latter. Whether he had knowledge of its terms and assented to its restrictions is for the jury to determine as a question of fact upon evidence *aliunde*, and all the circumstances attending the giving of the receipt are admissible in evidence to enable the jury to decide that fact.

This is reasonable doctrine. As, by the receipt, the carrier claims his common law liability is restricted, so the other party should be allowed to show he did not so accept it and understand it. It is a proper question for the jury, to be determined by the circumstances surrounding the transaction. But conceding the terms of a receipt of this kind are well understood and assented to by the shipper, it can not be conceded it will excuse negligence, and it is on that ground we place the decision of this case. The facts are, this company chose to risk the safe transportation of these goods to the Pittsburgh and Fort Wayne Railroad. It was of their own selection, and to their care and diligence they committed them. It is in proof the train, in an express car of which these goods were, was wrecked near Fort Wayne, on the morning of March 20, 1872, by striking a broken rail, the express car, baggage car, coaches an done sleeping-car, going over. The stove in the baggage car upset, went to pieces, set the baggage car on fire, causing that car and the express car and the coaches and sleeping-car to burn up. The train was running at the rate of thirty or thirty-five miles an hour. The baggage car was next behind the express car and telescoped into the express car, and there was where the fire originated. There was a stove with fire in it, in the express car. The contents, including these packages of furs, were entirely consumed. This is the testimony of the baggage-master and the express-messenger for the Adams Express Company, and though the engine-driver, on his cross-examination, stated, he thought the baggage car did not telescope into the express car, he also says, he would not be as likely to know about that as the baggage-master and those on the baggage and express cars. We consider it as proved, the baggage car, which was in the rear of the express car, did telescope with that car, broke the stove to pieces, by which both cars were set on fire and their contents consumed.

It is plain this destruction was caused by this telescoping. Had the cars been constructed properly, and with a view to the avoidance of such accidents, which had been common prior to 1872, and which aroused the inventive spirit of railroad men and others, a contrivance was produced which the evidence tends to show in a great measure prevents them, and which many railroad companies had introduced into their service some years prior to the time of this occurrence. It is a simple contrivance not very expensive, and as we understand it, a sure preventive to telescoping, rendering that practically impossible, especially in a collision. It consists principally in so constructing the cars that the sills and the platform shall run even on a line with each other. It has received the name of the inventor, and is known as the "Miller Platform," though the one designed by Mr. Blackstone of the Chicago and Alton Railroad Company, and in use by that company and other well regulated roads, is equally efficacious. These platforms were in use and well tested and approved long anterior to March, 1872, and had been adopted by prominent and leading roads in the West, and we should infer from the testimony, no railroad train of cars, whether for passengers or goods, can be considered safe without them. We are disposed to hold it was negligence of itself for railroad cars to be without such a platform or its equivalent.

This court has frequently held, that such corporations must adopt, for the safety of persons and property committed to their care, all well known and approved appliances, otherwise they can not escape a liability which may be traced to a want of such appliances. Modern invention has brought into successful use the safety platform and the air brake, both contributing most essentially to the protection of human life and property, and a railroad company which shall attempt to transact its hazardous business without these improvements, would be justly held as guilty of negligence. An express company, choosing such a corporation to do its business, entering into its service, knowing, as they must be presumed to know, the absence of these improvements, would be equally chargeable. For culpable defects in vehicles used by common carriers, the law justly makes the carrier responsible. Story on Bailment, § 571. Camden and Amboy R. R. Co. v. Burke, 13 Wend. 611; Sayer v. Portsmouth Sand Pond E. R. R. Co., 3 Me. 228.

That the agreement set up by the express company did not absolve them from proper care and protect them from negligence, is settled by the Adams Express Co. v. Slittaners, 61 Ill. 184, where the agreement was of a like character. The carrier was held not excused from the exercise of reasonable and ordinary care, and was permitted to recover the full value of the goods. It seems clear to us these goods would not have been destroyed had not the baggage car, in which a heated stove was upset, telescoped with the express car and set it on fire. That this could have been prevented by ordinary and reasonable care by having a proper platform then in common use, is apparent.

It is said that the case of Oppenheimer & Co. v. The United States Express Co., 69 Ill. 62, is not in harmony with the case, *supra*, in 61 Ill. We see no clashing in the cases. In the first case cited, there was negligence on the part of the company, in the latter no negligence was charged or proved. The court say, the established legal construction of conditions like these, is not to treat them as providing against losses or injuries occasioned by actual negligence on their part.

Exceptions were taken by appellants to certain rulings of the court on evidence offered by them, as to an understanding with this company to transport their goods at a non-valuation rate. All testimony of this kind, going to vary or contradict the receipt, in so far as the receipt can be regarded as the agreement of the parties, was properly excluded, on a familiar principle. The testimony, however, in relation to the improved platform, was improperly excluded; a full inquiry should have been allowed this topic, and in connection therewith, testimony as to the real value of the goods was admissible. In very many cases, the party accepting these receipts does not comprehend their true import, and the most satisfactory evidence should be furnished that their terms were comprehended and assented to by hand or deed. As in the transportation of property, common carriers stand as insurers, it is the duty of the insured to communcate every fact essential to the risk. The basis of the contract of insurance is good faith on the part of the assured. A material fact is one that shows the nature and extent of the risk, and operates as an inducement on the other party to enter into the contract. If a shipper conceals a large amount of money in a common rough goods-box and it is so delivered to a carrier, and a loss occurs, the carrier would not be responsible for the money, for the

reason the owner was guilty of a fraud upon the carrier.

Had the carrier been informed the box contained a large sum of money, he would have made a corresponding charge for the risk, and taken great care in its preservation. This is the presumption. When a small package contains an article of great value, there is great propriety the carrier should have information thereof, but in large, bulky articles, such as barrels of flour, bales of cotton and the like, there appears to be no necessity for giving information of the value, as the carrier can determine that for himself. The design is to insure good faith. Was an inquiry made of a shipper of the value of the goods about to be shipped, he would be bound to state truly the value, but when the value appears in the package itself, such an inquiry would be useless, and a voluntary statement unnecessary. The jury should look to the purpose and object of such conditions, and if they see everything is fair and there is no fraud or concealment on the part of the shipper, they should be well assured the terms of the receipt were understood and assented to by the shipper. It is true a contract is a contract, and must be enforced, yet courts and juries can always inquire into its true spirit and meaning and enforce it accordingly.

The judgment is reversed and the cause remanded that a new trial may be had in conformity with this opinion. JUDGMENT REVERSED.

NOTE.—It is now well settled that an express company is liable as well for the negligence of a railroad company or other carrier employed to transport freight for it, as for its own; and that such liability can not be evaded by any form of contract whatever. Bank of Kentucky v. Adams Express Co., 93 U. S. 174; s. c., 4 Cent. L. J. 35; Snider v. Adams Ex. Co., Id. 179, *note*. But the carrier may receive freight for transportation beyond his line, stipulating that his liability shall cease with its delivery to the next carrier. Id.

The rule laid down in the principal case, requiring the carrier to furnish the most satisfactory evidence that the terms of the contract limiting liability were comprehended and assented to by the shipper, is an arbitrary departure from the requirements of the common law, and we think clearly against the current of authority. If anything is well settled it is that one who receives a written contract, without objection to its terms, will be presumed, in the absence of proof of fraud or imposition, to have assented to it; and we can see no good reason why a common carrier should be excepted from the operation of this rule. In Snider v. Adams Ex. Co., *supra*, the Supreme Court of Missouri held that it was not the duty of the express company to call the shipper's attention to the stipulation in the receipt, and that "in absence of proof of fraud, imposition or deceit, the law presumes he had knowledge of it." To same effect see cases cited in note to this last case, 4 Cent. L. J. 181. In York Company v. Central Railroad Company, 3 Wall. 107, where the freight was received and shipped before the bills of lading were signed, and the shipper testified he had not examined the bills and that his attention was not called to the clause limiting the liability of the carrier, the contract was held valid, nevertheless. This case was cited with approval in Bank of Kentucky v. Adams Ex. Co. 93 U., S. 188. In Robinson v. Merchants &c., Co., 11 West. Jur. 269, decided by the Supreme Court of Iowa, at the April term 1877, where the receipt given for the freight contained a clause relieving the company from liability on account of loss from fire, Rothrock, J., said: A question is made as to the time at which the bill of lading was delivered to Rawson & Co.. The actual delivery of the goods was made by one Henry, the drayman of Rawson & Co. He testified that he asked for a bill of lading and it was delivered to him. We must assume from this that it was delivered at the time of the delivery of goods to the defendant, and a delivery to the drayman of Rawson & Co. was equivalent to a delivery to them. The plaintiffs further insist that the limitation in the contract as to loss by fire was not known to them at the time of the shipment. This was a transaction done in the ordinary and usual course of business. Rawson & Co. undertook to ship the goods in question to plaintiffs, we must presume, at plaintiffs' request. Whatever contract of shipment Rawson & Co. made, is binding on the plaintiffs, and the plaintiffs can not avoid it by showing that Rawson & Co. received it, and forwarded it without examination. In the absence of fraud or mistake, the shipper will be conclusively presumed to know the stipulations contained in a contract of affreightment. He can not be permitted to show he was ignorant of its contents."

We think with the judge who delivered the opinion in the principal case, that a contract is a contract, or ought to be; and that in such a case a carrier is under no obligations to keep an expert to value freight delivered to him for transportation. It would frequently happen that the more bulky articles offered would be of much less value than smaller packages. Here the large bundle of furs was worth but a small part as much as one of the small bundles. Was it the duty of the carrier to inquire into the value of the freight, under the circumstances. We think not. It was justified in relying upon the terms of its contract, which required the shipper to value the freight. M. A. L.

THE ENGLISH COURTS—THEIR FORMER AND THEIR PRESENT ORGANIZATION AND JUDGES.*

In order to understand the changes made by the Judicature Acts of 1873 and 1875, it is necessary to consider briefly the formation and powers of the courts in England before the passage of those acts, and then to show the changes effected thereby. We proceed, firstly, to show the construction and powers of such courts before those acts, borrowing quite largely from the preface to the second volume of these reports, and, secondly, to show the changes wrought by the Judicature Acts.

Before those acts the courts of England material to be inquired of were:

THE HOUSE OF LORDS.—The House of Lords was, as a general rule, a tribunal of appeal, in all causes of common law or equity, commenced in England, Ireland or Scotland, such appeal being original, or after the intervention of a previous appeal to another court, as the case might be. It was the court of last resort, from whose judgment no further appeal was permitted, and every subordinate tribunal was bound to conform to its determinations.

There was no appeal to the House of Lords from the Ecclesiastical, Maritime or Prize Courts in England, nor from India or any of the colonies. The appeal in such cases was to the Queen in Council, and was heard before the Judicial Committee of the Privy Council.

THE PRIVY COUNCIL.—This, according to Sir Edward Coke (4 Inst. 53), was a noble, honorable and reverend assembly of the King, and such as he willed to be of his Privy Council, in the King's Court or Palace. His will was the sole constituent of a Privy Councilor, and this also regulated their number. The Privy Council was formerly dissolved by the death of the sovereign; but by statute (6 Anne, chap. 7), the Privy Council continues for six months after the demise of the sovereign, unless sooner determined by his successor. So far as the present inquiry is concerned, it may be stated that the Privy Council had in certain cases the judicial authority of a court of justice: 1. In Colonial causes; this was both original and appellate; 2. In appeals from the Lord Chancellor in matters of lunacy; 3. In appeals from the ecclesiastical or maritime courts; 4. In applications to prolong the term of patents for new inventions, and in certain cases arising out of the copyright acts.

Under the provisions of modern statutes all the judicial authority of the Privy Council was exercised by a select number of its members, called the Judicial Committee, which heard the allegations and proofs and made its report thereon to "Her Majesty in Coun-

*We publish this—the preface to volume 15 of Mr. Moak's English Reports—in advance of the volume, by permission of Messrs. Gould & Son, of Albany, N. Y., the publishers.

cil" by whom the judgment was finally given. By statute (3 and 4 William IV, chap. 41, sec. 1; 14 & 15 Vict., chap. 83, sec. 15), this committee consisted of the President of the Council, the Lord Chancellor, and the Lord Justices of the Appeal in Chancery, if of the Privy Council, the Lord Keeper or First Lord Commissioner of the Great Seal, the Lord Chief Justice of the Court of King's Bench, the Master of the Rolls, the Vice-Chancellors, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Court of Exchequer, the Judge of the Prerogative Court of Canterbury, the Judge of the High Court of Admiralty, the Chief Judge in Bankruptcy, and also all persons who were members of His Majesty's Privy Council, who should have been president thereof, or should have held the office of Lord Chancellor or any of the offices before mentioned. Two other persons, being members of the Council, might also be appointed by the Crown to be members of the Judicial Committee. No matter could be heard or report made unless in the presence of at least three of the committee, exclusive of the Lord President for the time being. By 34 and 35 Vict., chap. 91 (Aug. 21, 1871), the Queen was authorized to appoint four additional persons members of the Judicial Committee of the Privy Council, who should be or should have been judges of the Superior Courts at Westminster, or a Chief Justice of the High Court of Judicature at Fort William in Bengal, or Madras or Bombay. It was further provided that, if any person appointed under *that act* was, at the date of his appointment, a judge as aforesaid, he should vacate his office as such judge, but his pension should remain the same as if no such appointment had been made, and that each should receive a salary of five thousand pounds per annum. It was further provided that the paid judges of the Judicial Committee of the Privy Council should hold their offices notwithstanding the demise of the crown, but they should be removable by Her Majesty, her heirs or successors, upon the address of both Houses of Parliament.

THE HIGH COURT OF CHANCERY.—This court might property be divided into four heads: 1. The Lord High Chancellor. 2. The Court of Appeal in Chancery. 3. The Master of the Rolls. 4. The Vice-Chancellors.

First. The jurisdiction and duties of the Lord Chancellor were too well known to require a detailed enumeration thereof. They are given in the "Practice in Chancery," Choyce Cases in Chancery (57–61). An appeal would lie from his judgments to the House of Lords.

Second. The Court of Appeal in Chancery.—An addition was also made (14 and 15 Vict., chap, 83; 30 and 31 Vict. chap. 64) of two judges called the Lord Justices of the Court of Appeal in Chancery; which court consisted of the Lord Chancellor together with these judges, and which possessed all the jurisdiction exercised by the Lord Chancellor, himself, so far as his judicial business in chancery was concerned; without prejudice, however, to his right to sit, as formerly, alone. To this court, the powers of which might be exercised not only by its full body, but by either of its judges together with the Lord Chancellor, or by both the judges (or for some purposes by either of them sitting separately) apart from the Lord Chancellor. An appeal from the Master of the Rolls or from any of the Vice-Chancellors might be referred to it, or such appeal might be entertained by the Lord Chancellor, sitting alone, in his proper jurisdiction. This court also entertained appeals in bankruptcy. From these jurisdictions an ultimate appeal might be taken to the House of Lords.

Third. The Master of the Rolls.—The judicial duties of the Court of Chancery had been long shared, in some measure, by an officer of high rank called the Master of the Rolls, who was originally appointed only for the superintendence of the writs and records appertaining to its common law department, but accustomed to sit also on the equity side as a separate, though a subordinate, judge. By statute (3 Geo. II, chap. 30), passed to settle divers disputes, it was enacted that all orders and decrees by him made, except such as by the course of the court were appropriated to the great seal alone, should be deemed to be valid, subject nevertheless to be discharged or altered by the Lord Chancellor. By a subsequent statute (3 and 4 William IV, chap. 94, sec. 24), the Master of the Rolls (subject to the same qualification) was especially directed to hear motions, pleas and demurrers, as well as causes generally which should be set down before him. Appeal might be taken from his judgment, and was heard by the Lord Chancellor or the Court of Chancery Appeal, as heretofore stated. The origin of this officer, his oath of the office and the duties of the incumbent, are fully given in the "Practice in Chancery," Choyce Cases in Chancery (61–66).

Fourth. The Vice-Chancellors.—The increase of business in the Court of Chancery rendered it necessary that an assistant to the Lord Chancellor, in his judicial functions, should be appointed. One was accordingly appointed in 1813 with the title of Vice-Chancellor. In 1841, after the transfer of the equity business of the Court of Exchequer to the High Court of Chancery, two more Vice-Chancellors were added to its judicial list. They sat and acted separately. An appeal from the decision of either might be taken, which was heard by the Lord Chancellor alone, by the Lord Chancellor sitting with the Lord Justices, or by the Lord Justices alone, as heretofore stated.

COMMON LAW COURTS.—There were three courts of common law jurisdiction—the Court of Queen's Bench, the Court of Common Pleas, and the Court of Exchequer, which, when mentioned collectively, were usually called the Superior Courts of the Common Law, and when taken in connection with the High Court of Chancery, were called the Courts at Westminster. The judges were the legal advisers of the House of Lords, and were frequently called upon by that body for their opinions upon questions of law before it.

THE QUEEN'S BENCH.—The sovereign formerly sat in this court, in person, and hence it was called the King's Bench in the reign of a King, and Queen's Bench in the reign of a Queen.

It was the Supreme Court of Common Law in the kingdom, and consisted of a chief justice, styled the Chief Justice of England, and five *puisne* justices. Its jurisdiction was very high and transcendant. It kept all courts of inferior jurisdiction within the bounds of their authority, and might either remove their proceedings, to be therein determined, or prohibit their progress below. It superintended all civil corporations in the kingdom, and commanded magistrates and others to do what their duty required in every case where there was no other specific remedy. It protected the liberty of the subject by speedy and summary interposition. It took cognizance of both criminal and civil causes; the former on what is called the *crown* side; the latter on the *plea* side of the court. On the crown side it had jurisdiction of all criminal offences, from the highest to the lowest; on the plea side, or civil branch, it enjoyed (though originally by usurpation, as in the case of the Exchequer) a general jurisdiction and cognizance over all actions between subject and subject—those of the real class only excepted. It did not meddle, however, with matters of revenue. Proceedings in error might be taken from this court into the Exchequer Chamber.

THE COMMON PLEAS.—By the charter of King John, confirmed and acted upon by Henry III, the Court of Common Pleas was directed to be held "in some

certain place." This court had jurisdiction of and heard causes between private individuals—of all actions between subject and subject. It was sometimes technically called the Court of Common Bench. Its judges were six in number—one Chief Justice and five *puisne*; and from a judgment in this court, proceedings in error might be taken into the Exchequer Chamber. It has always been considered the principal seat of learning relative to ordinary actions between man and man, and is styled by Coke (4 Inst. 99), "the lock and key of the common law."

THE COURT OF EXCHEQUER.—This court was at first intended, principally, to order the revenues of the crown and recover the King's debts and duties, though it had since acquired—originally by usurpation—the additional character of an ordinary court of justice. It was called the Exchequer from the chequed cloth, resembling a chess-board, which covered the table there, and on which, when certain of the king's accounts were made up, the sums were marked and scored with counters. This court was, from the time of the separation of the Exchequer from the *aula regia* down to 1841, subdivided into a court of equity and of common law. In 1841 its powers and jurisdiction as a court of equity were transferred to the Court of Chancery. It consisted of a *revenue* side, and of a common law, or *plea* side. As a court of law, on the revenue side, it ascertained and enforced, by proceedings appropriate to the case, the proprietary rights of the crown against the subjects of the realm; in the capacity of a court of common law on the *plea* side, it administered redress between subject and subject in all actions personal, though not in real actions. Its judges were termed *Barons* and were six in number, one of whom was styled the Chief Baron. Proceedings to correct any error that might be found in the judgment of this court might be taken to the Exchequer Chamber.

THE EXCHEQUER CHAMBER.—This court was a court for the review of judgments of the Courts of Common Pleas, Queen's Bench, and Exchequer. It consisted of all the judges of the three last-named courts, and occasionally the Lord Chancelor. In review of a judgment of the court below, the judges of the court in which the judgment was rendered did not sit; so that, on appeal from the Common Pleas, the judges of the King's Bench and the Barons of the Exchequer composed the court; on appeal from the King's Bench the judges of the Common Pleas and the Barons of the Exchequer, and on appeal from the Exchequer the judges of the Common Pleas and the King's Bench. From the judgment of the Exchequer Chamber proceedings in error might be taken to the House of Lords. Its decisions were published with those of the court from which the appeal was taken.

THE COURT FOR CROWN CASES RESERVED.—By statute, certain trial-courts of Criminal Jurisdiction—Courts of Oyer and Terminer and Gaol Delivery, or Quarter Sessions,—When the court found in the case question of law too difficult to determine, might reserve the question and state it in the form of a special case for the consideration and judgment of the judges of the superior courts, and in the meantime postpone the judgment or respite the execution of it as might be thought fit. The question was then considered and decided by the judges of the Superior Courts of the Common Law. This court was sometimes called the Court of Criminal Appeal. It had no jurisdiction of cases arising on demurrer, and there was no appeal from its judgments. Regina v. Faderman, 3 Car. & Kirw. 353, 4 Cox, 359.

THE CENTRAL CRIMINAL COURT.—There was a court—some of the decisions of which are herein reported—called the Central Criminal Court, for the trial of offences committed in London, Middlesex and certain suburban parts of Essex, Surrey and Kent, composed of the Lord Mayor of London, the Lord Chancellor or Lord Keeper, the Judges of the Courts at Westminster, the Judge of the Admiralty, the Dean of the Arches, the Aldermen of London, the Recorder and Common Serjeant of London, the Judge of the Sheriff's Court there, any person who had been Lord Chancellor or Lord Keeper, or a judge of any of the courts at Westminster, and such others as the crown shall from time to time appoint. The crown was authorized to issue a commission of Oyer and Terminer and Gaol Delivery to such court, and the judges, or any two or more of them, held a session in the City of London or the suburbs thereof at least twelve times in every year. The Court of Queen's Bench might also remove into that court any indictment in any inferior court for a crime committed in a place out of the jurisdiction of the Central Criminal Court, and order the trial thereof to be had at the Central Criminal Court, provided it appeared expedient to the ends of justice that such course be taken. The Central Criminal Court was usually held by one or more of the Judges of the Superior Courts of Law, the Common Serjeant and the Judge of the Sheriff's Court.

ADMIRALTY COURTS.—The Maritime Courts consisted of the High Court of Admiralty and its Court of Appeal. In Her Majesty's possessions, beyond seas, there were also established courts called Vice Admiralty Courts, having jurisdiction over a variety of maritime cases. The High Court of Admiralty, held by the Judge of Admiralty,—the Judge of the Court of Probate may by a recent statute sit for him—had jurisdiction and power to try and determine all maritime causes, that is, such injuries as are committed on the high seas. An appeal might be taken from judgments of the High Court of Admiralty or the Vice Admiralty Courts to the Privy Council.

PROBATE COURTS.—The powers of a Court of Probate, substantially as understood by such a court in this country, were formerly exercised by the ecclesiastical courts. By statute, however, such powers were transferred to a court called the Court of Probate, which sat in London or Middlesex. "The judge thereof was required to be an advocate or barrister," and was appointed by patent under the great seal. An appeal would lie from its judgments to the House of Lords. Prior to the creation of this court the jurisdiction conferred thereon was exercised by the *Prerogative Court*, in each province, held before a judge appointed by the Archbishop thereof, for administering justice in testamentary matters, viz., those relating to probate and administration, and in those only. Its jurisdiction arose in the case (an extremely frequent one) where the deceased left *bona notabilia* in different dioceses. As in this case the matter could not be disposed of in any single diocese, the Archbishop claimed the jurisdiction by way of special *prerogative*.

DIVORCE COURTS.—By statute, a court called the "Court for Divorce and Matrimonial Causes" was created, to be held (when full) before the Lord Chancellor, the judges of the Superior Courts, together with the judge of the Court of Probate. The latter was judge *in ordinary* of the court, and when thus sitting alone was authorized to exercise in general the powers and duties of the full court.

ECCLESIASTICAL COURTS.—These courts had, it may be stated generally, jurisdiction of ecclesiastical questions, and an appeal would lie from the highest of them to the Privy Council.

THE COURT OF ARCHES.—This court was a court of appeal belonging to the Archbishop of Canterbury, whereof the judge (who sat as deputy to the

Archbishop), was called the *Dean of the Arches;* because he anciently held his court in the church of St. Mary-*le-bow*, though this court is now holden at Westminster. His proper jurisdiction was over the thirteen peculiar parishes belonging to the Archbishop in London; but the office of *Dean of the Arches* having been for a long time united with that of the Archbishop's principal official, he, in right of the last-mentioned office (as doth also the principal official of the Archbishop of York), received and determined appeals from the sentences of all inferior ecclesiastical courts within the province. Many suits, also, were brought before him as original judge, the cognizance of which properly belonged to inferior jurisdictions within the province, but in respect to which the inferior judge had waived his jurisdiction, under a certain form of proceeding known in the canon law by the denomination of *letters of request.* From the Court of Arches and from the parallel Court of Appeal in the province of York an appeal would lie to the Privy Council. The Court of Arches and the Court of Appeal in York are not affected by the Judicature Act. By statute 3 and 4 Vict., ch. 65, the *Dean of the Arches* was declared to be an assistant to and to be competent to sit for the judge of the High Court of Admiralty in all suits and proceedings in the said court. We have not been able to discover that this has been changed by the Judicature Act.

THE CONSISTORY COURTS.—The Consistory Court of the Bishop was held in the several cathedrals, for the trial of all ecclesiastical causes arising within the diocese. The Chancelor of the diocese, or his commissary, was the judge, and from his sentence an appeal would lie, by virtue of 24 Hen. VIII, ch. 12, to the Archbishop of each province respectively. We do not discover that they are affected by the recent acts.

EFFECT OF THE JUDICATURE ACT.—Such was the condition of the courts prior to the Judicature Acts. We proceed, *secondly*, to consider the changes therein, wrought thereby.

By the act termed the "Supreme Court of Judicature Act, 1873," and the amendments, the Supreme Court of Judicature is to consist of two permanent divisions, one of which, under the name of "Her Majesty's High Court of Justice," shall have and exercise original jurisdiction, with such appellate jurisdiction from inferior courts as are therein mentioned, and the other of which, under the name of "Her Majesty's Court of Appeal," shall have and exercise appellate jurisdiction. For all practical purposes here (by 39 and 40 Vict., chapter 59, § 6) the House of Lords retains its powers and functions to hear appeals from "Her Majesty's Court of Appeal in England, and from the Courts of Scotland and Ireland."

By section 6 it is provied that, for the purposes of aiding the House of Lords in the hearing and determination of appeals, Her Majesty may appoint two qualified persons to be Lords of Appeals in ordinary, who must have been, for at least two years, of some one or more of the offices described in the act as high judicial officers, or have been, for not less than fifteen years, a practicing barrister in England or Ireland, or a practising advocate in Scotland. They are to receive a salary of six thousand pounds a year. If a Privy Councillor, he is to be a member of the Judicial Committee of the Privy Council and to sit and act as such. By section 14, upon the death or resignation of any two of the paid judges of the Judicial Committee of the Privy Council, Her Majesty is authorized to appoint another Lord of Appeal in ordinary, and upon the death or resignation of the other two of said paid judges, she may appoint still another.

By 38 and 39 Vict., section 4 of chap. 77, as amended by 39 & 40 Vict., section 15 of chap. 59, "Her Majesty's Court of Appeal," which practically takes the place of the Exchequer Chamber in appeals in common law actions, and also hears appeals in Chancery previously heard by the Chancellor or by the Court of Appeal in Chancery in the exercise of its appellate jurisdiction, and of the same court as a Court of Appeal in Bankruptcy (§ 18, act of 1873), is to consist of *five ex officio* judges, consisting of the Lord Chancellor as president, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas and the Lord Chief Baron of the Exchequer, and *six* ordinary judges of the Court of Appeal, the first three additional judges to be made by transfer to the Court of Appeal of three judges of the High Court of Justice. Her Majesty may, by writing under her sign manual, transfer to the Court of Appeal from the Divisions of the High Court of Justice, that is to say, the Queen's Bench Division, the Common Pleas Division and the Exchequer Division not exceeding three judges in number, as to Her Majesty shall seem meet; and every judge so transferred shall be deemed an additional ordinary judge of the Court of Appeal. Every additional ordinary judge shall be under an obligation to go Circuits and to act as Commissioner under Commissions of Assize or other commissions authorized to be issued in the same manner in all respects as if he were a judge of the High Court of Justice. The ordinary judges of the Court of Appeal are to be styled, by the act of 1877, Lords Justices of Appeal.

By section 16 orders for constituting and holding divisional courts of the Court of Appeal (to consist of two or three and no more of the judges thereof, sec. 40, act 1873), and for the regulating of the sitting of the Court of Appeal and of the divisional Courts of Appeal, may be made and rescinded by the President of the Court of Appeal, with the concurrrence of the ordinary judges of the Court of Appeal or any three of them. No judge of the Court of Appeal shall sit as a judge, on the hearing of an appeal from any judgment or order made by himself or made by any divisional court of the High Court of which he was and is a member. Every appeal to the Court of Appeal from a final determination must be heard by at least three judges, and from an interlocutory order by not less than two.

The High Court of Justice consists of five Divisions, as follows:

1. The CHANCERY DIVISION, consisting of the Lord Chancellor, who shall be President, the Master of the Rolls, and the Vice-Chancelors of the Court of Chancery, or such of them as shall not be appointed ordinary judges of the Court of Appeal. By an act passed April 24, 1877 (12 L. J. 251), which has not yet reached us, a new judge, to be in the same position as if he had been appointed a *puisne* judge of the High Court under the Supreme Court of Judicature Acts (1873 and 1875) was to be appointed. He is to be attached to the Chancery Division. The *puisne* judges are to be styled Justices of the High Court. By section 3 of the act of 1875, the Lord Chancelor is not to be deemed to be a permanent judge of the High Court of Justice.

2. The QUEEN'S BENCH DIVISION, consisting of the Lord Chief Justice of England, who shall be President, and such of the other judges of the Court of Queen's Bench as shall not be appointed ordinary judges of the Court of Appeal.

3. The COMMON PLEAS DIVISION, consisting of the Lord Chief Justice of the Common Pleas, who shall be President thereof, and such of the other judges of the Court of Common Pleas as shall not be appointed ordinary judges of the Court of Appeal.

4. The EXCHEQUER DIVISION, consisting of the Lord Chief Baron of the Exchequer, who shall be President thereof, and such of the Barons of the Court of Ex-

chequer as shall not be appointed ordinary judges of the Court of Appeal.

Divisional courts of the High Courts of Justice may be held for the transaction of any business which may for the time being be ordered by rules of any court to be heard by a divisional court to be constituted of two of the judges of the court and no more, unless the President of the Division to which such divisional court belongs, with the concurrence of the other judges of such Division, or a majority thereof, is of opinion that such divisional court should be constituted of a greater number of judges than two, in which case such court shall be constituted of such number of judges as the President, with such concurrence as aforesaid, may think expedient.

CROWN CASES RESERVED, under 11 and 12 Vict., chap. 78 and amendments, are (§ 48) to be heard by the judges of the High Court of Justice, or five of them at the least, of whom the Lord Chief Justice of England, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, or one of such chiefs at least, shall be part. Their determination is final and without appeal save for some error of law upon the record as to which no question shall have been reserved for the consideration of said judges under 11 and 12 Vict. Its decisions are reported with those of the Queen's Bench Division.

5. THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION, consisting of two judges, one of whom shall be the Judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes and the Judge of the High Court of Admiralty. The Judge of the Court of Probate shall be the President of the said Division and subject thereto the senior judge of the said Division.

REPORTS.—The present series of reports, in Alphabetical order, is as follows:

APPEAL CASES.—Cases decided by the House of Lords and Privy Council.

CHANCERY DIVISION.—Cases decided by that Division.

COMMON PLEAS DIVISION.—Cases decided by that Division.

EXCHEQUER DIVISION.—Cases decided by that Division.

PROBATE DIVISION.—Cases decided by the Probate, Divorce and Admiralty Division.

QUEEN'S BENCH DIVISION.—Cases decided by that Division, and also *Crown Cases Reserved*.

The cases decided by the court of appeals are reported with the cases of the division from which the appeal was taken.

They are indicated at the head as, "In the Court of Appeal," or by the letters "C. A."

The different reports are quoted as follows: 1 Appeal Cases, or 1 App. Cas.; 1 Chancery Division, or 1 Ch. Div.; 1 Common Pleas Division, or 1 C. P. Div.; 1 Exchequer Division, or 1 Ex. Div.; 1 Probate Division, or 1 P. Div.; 1 Queen's Bench Division, or 1 Q. B. Div.

NATHANIEL C. MOAK.

ALBANY, N. Y., July 1877.

JUDGES.

LORD HIGH CHANCELLOR.

Right Hon. LORD CAIRNS, appointed 1874.

LORDS OF APPEAL IN ORDINARY.

Right Hon. LORD BLACKBURN, appointed 1876.
Right Hon. LORD GORDON, " "

PRIVY COUNCIL, JUDICIAL COMMITTEE.

Appointed under 34 & 35 Vict., ch. 91; usually sitting.

Right Hon. Sir JAMES W. COLVILLE,
Right Hon. Sir BARNES PEACOCK,
Right Hon. Sir MONTAGUE E. SMITH,
Right Hon. Sir ROBERT P. COLLIER.

SUPREME COURT OF JUDICATURE—COURT OF APPEAL.

Ex officio Members.

The Right Hon. the LORD HIGH CHANCELLOR, (President).
The Right Hon. the LORD CHIEF JUSTICE of England.
The Right Hon. the MASTER OF THE ROLLS.
The Right Hon. the LORD CHIEF JUSTICE of the Common Pleas.
The Right Hon. the LORD CHIEF BARON of the Exchequer.

Ordinary Members.

Right Hon. Sir WILLIAM MILBOURNE JAMES, appointed 1870.
Right Hon. Sir GEORGE MELLISH,* appointed 1870.
Right Hon. Sir RICHARD BAGGALLAY, " 1875.
Right Hon. Sir GEORGE Wm. W. BRAMWELL, appointed 1876.
Right Hon. Sir WILLIAM BALIOL BRETT.
Right Hon. Sir RICHARD PAUL AMPHLETT, appointed 1876.

HIGH COURT OF JUSTICE—CHANCERY DIVISION.

Right Hon. the LORD HIGH CHANCELLOR, (President).
Right Hon. Sir GEORGE JESSEL, Master of the Rolls, appointed 1873.
Hon. Sir RICHARD MALINS, Vice-Chancellor, appointed 1866.
Hon. Sir JAMES BACON, Vice-Chancellor, appointed 1870.
Hon. Sir CHARLES HALL, " " " 1873.
Hon. Sir EDWARD FRY, Justice of the High Court,† appointed 1877.

QUEEN'S BENCH DIVISION.

Right Hon. Sir ALEXANDER JAMES EDMUND COCKBURN, Bart., G. C. B., Lord Chief Justice of England, appointed 1859.
Hon. Sir JOHN MELLOR, appointed 1861.
Hon. Sir ROBERT LUSH, " 1865.
Hon. Sir WILLIAM FIELD, " 1875.
Hon. Sir HENRY MANISTY, " 1876.

COMMON PLEAS DIVISION.

Right Hon. LORD COLERIDGE, Lord Chief Justice of the Common Pleas, appointed 1873.
Hon. Sir WILLIAM ROBERT GROVE, appointed 1871.
Hon. GEORGE DENMAN, " 1872.
Hon. Sir NATHANIEL LINDLEY, " 1875.
Hon. Sir HENRY CHARLES LOPES, " 1876.

EXCHEQUER DIVISION.

Right Hon. Sir FITZ-ROY KELLY, Lord Chief Baron, appointed 1866.
Hon. Sir ANTHONY CLEASBY, appointed 1868.
Hon. Sir CHARLES EDWARD POLLOCK, " 1873.
Hon. Sir JOHN WALTER HUDDLESTON, " 1875.
Hon. Sir HENRY HAWKINS, " 1876.

COURT OF APPEAL IN BANKRUPTCY.

The Ordinary Judges of the Court of Appeal.

PROBATE, MATRIMONIAL, DIVORCE AND ADMIRALTY DIVISION.

Right Hon. Sir JAMES HANNEN, (President), appointed 1872.
Right Hon. Sir ROBERT J. PHILLIMORE, appointed 1876.

CHIEF JUDGE IN BANKRUPTCY.

Hon. Sir JAMES BACON, Vice-Chancellor.

JUDGE OF THE COURT OF ARCHES.

LORD PENZANCE, appointed 1875.

ATTORNEY-GENERAL.

Sir JOHN HOLKER, appointed 1875.

SOLICITOR-GENERAL.

Sir HARDINGE STANLEY GIFFARD, appointed 1875.

* Died June 16, 1877, 12 Law Jour. 372.

† Appointed April 30, under the act of April 24, 1877; 12 Law Jour. 251.

BOOK NOTICES.

BISHOP'S BURRILL ON ASSIGNMENTS. A Treatise on the law and practice of Voluntary Assignments for the benefit of creditors by ALEXANDER M. BURRILL. Third edition, revised and enlarged by JAMES L. BISHOP. New York, Baker, Voorhis & Co., Publishers, 1877.

This work is somethig more than a new edition of the old and familiar "Burrill on Assignments." The editor says he has "undertaken the delicate task of revising as well as annotating the text." This was

rendered necessary by the repeal of many statutes in force when the former edition was issued, the interposition of a code and system of bankruptcy, and of many new statutory regulations concerning voluntary assignments, and more than a thousand new decisions illustrating the questions discussed in the treatise. With all these new features arsing since the edition of 1858 was published, Mr. Bishop still says his "design has been to make as few alterations in the language of the original work as possible, although in some instances, for "the sake of brevity, the order of chapters, paragraphs and sentences has been changed." Accordingly we find that, in several instances, a number of the old chapters have been consolidated into one in the new work; another chapter has been partially re-written; and another entire new one has been added, and the important subject of assignments considered with reference to the Bankrupt Law.

But this is not all. Aside from the new chapter, and despite all the condensations, the text of the new work is larger by many pages than the old. The division into sections is a wholly new feature. The paging is of course entirely new. The typography and dress of this edition are not only a vast improvement upon the old work by the same printers, but they are in the highest style of the art. All these changes combine to make Mr. Bishop's, not a new edition, but an almost entirely new book. No one can criticise his adventure; and the matter, no less than the manner of its execution, is highly praiseworthy. But Mr. Bishop has certainly manifested an undue modesty in ascribing his work so far to Mr. Burrill as to retain the prominence of the latter's name. It will be impossible to use this as a new edition of Burrill. Citations from, or references to the old work are useless with the new. The latter can only be cited by the title given to it at the head of this notice. Though the major part of the book be the text of the first author, it is now presented in the new dress of the revising author. The profession will know the book henceforth as "Bishop's Burrill."

The wonderful development of this branch of the law may surprise those who have not noticed it as being almost peculiarly of American out-growth. The "Practical Summary of the Law of Assignments," by Mr. Angell, which appeared in 1835, contained but 198 16-mo. pages. This little work was, at the time, a very fair exposition of the law as it then stood. Its citations were mainly from American authorities, though English references were numerous to cases settling principles as to sales and transfers of personalty. The American development of the subject was even then a matter of observation and comment. Mr. Angell took pains to refer to the absence in this country of a general bankrupt law, as explaining in part the growth here of the law of voluntary assignment, and as furnishing the occasion for the preparation of his manual.

Eighteen years later, this branch of the law had so extended as to call for Mr. Burrill's first edition, in which "its distinctively American character" receives further recognition. The paucity of English citations in each of the earlier editions of Mr. Burrill's work has become only more apparent in the new edition. Singularly enough, after ten years' administration of a general American system of bankruptcy, with a large measure of success, a new issue of this treatise on voluntary assignments, not only meets a popular demand, but does so largely by the presentation of a chapter devoted to the relations of the two rival systems. Thus have the inherent powers and necessities of American commerce asserted themselves. Perhaps it would have been otherwise if congress had maintained continuously since 1800 a general system of bankruptcy. Voluntary assignments might then have fallen quietly into desuetude. But now they are an established feature of practical American jurisprudence, and are asserting their right to an existence by the side of a bankruptcy system similar to that which throttles them in England.

Whether voluntary assignments are entitled to the right to live, under the bankrupt laws, is the question involved in Mr. Bishop's new chapter. There is scarcely room to doubt that, as to assignments with preferences or conditions, this right should be, as we believe it always is, denied. But it is otherwise as to general and unconditional assignments without preferences. These make precisely the same disposition of the debtor's assets which will be made by the bankruptcy courts, saving and excepting the liberal fees allowed to the officials of those courts. Are they, for this reason, under a ban? Does the federal law feel that instinctive and positive aversion to any system of equal distribution to be administered outside of its pale, which is imputed to it in the erudite opinion of the late learned Judge Emmons, in Globe Ins. Co. v. Cleveland Ins. Co., 14 N. B. R. 314, and such as distinguishes the English law? Is the Federal law in this sense a "jealous mistress" which will not tolerate the rival system of voluntary, unconditional assignments? These are questions which are disputed in the courts, and which we fear Mr. Bishop has not done much towards settling, if indeed he has tried to do so. He finds no difficulty in the proposition that the right of a debtor to make such an assignment "exists, independent of any statute," and is not suspended by the general bankrupt law. He finds "open and undetermined" the question whether making such an assignment by a debtor is an act of bankruptcy; and the discussion of this question, which his citations of authorities exhibit, is, though not exhaustive, sufficiently full to inform the ordinary reader or practitioner, and to show a probable weight of authority in favor of the proposition. But, conceding that the assignment is *per se* an act of bankruptcy, does it follow necessarily or logically that the assignment is rendered void by subsequent bankruptcy in fact? On this question we do not find Mr. Bishop clear. There are indications that he does not see any necessary relation between the assignment as an act of bankruptcy, and the force of the assignment as a conveyance of property. But he has failed to elaborate the distinction, and, if he sees it, we fear he has overlooked its importance. A voluntary, unconditional assignment is *per se* a confession of financial weakness and insolvency, and no statute can be required to make it an act of bankruptcy. But it is not every "act" of bankruptcy which results in, or is speedily followed by actual bankruptcy. A petition is to be filed, which must necessarily be subsequent in time to the "act," and the adverse and controlling title of the assignee who is afterwards appointed, relates back only to the date of the petition. In the absence of fraud, is there any magic in the adjudication of bankruptcy which can operate to divest the title of a voluntary assignee, already honestly and lawfully acquired? The courts which, in reply to this question, cry out—"act of bankruptcy," do not answer it, they merely evade it. No question could be more pertinent than this to the topic of "Voluntary assignments considered in connection with the bankrupt law," which forms the heading of Mr. Bishop's chapter 3. He had a fine opportunity for a thorough discussion of the subject. Possibly he avoided the discussion because the courts have done so for several years. But, in our opinion, this is a subject of so great importance that the text-writer should not hesitate to lead on in advance of the courts, if need be. J. O. P.

CORRESPONDENCE.

MELVIN V. LISENBY.

To the Editor of The Central Law Journal:

Permit me to add to Mr. Low's learned note to the decision in Melvin *et al.* v. Lisenby *et al.*, reported in your Journal of the 6th inst., a few comments. The judgment, in that particular case, is doubtless correct, for two reasons: 1, because it is established doctrine in Illinois, that a majority of those voting at an election is the equivalent, under her constitution and laws, of a majority of all the voters; and, 2, because, even if the Funding Act of April 16th, 1869, had modified this rule, the registration of the bonds by the auditor was an official finding of the fact that the voters in favor of the bonds constituted a majority "of the legal voters living in the county."

But in its *obiter dicta* in the opinion in the case, the Supreme Court of Illinois makes some dangerous allegations, which are the more remarkable because they directly conflict with the decision of the Supreme Court of the United States in Harshman v. Bates County. The former court says: "But how was it to be ascertained whether a majority of the voters in the county were in favor of the subscription? The mode provided by law for ascertaining the sense of the legal voters upon the question was by a vote at a special election called for the express purpose of determining the question, on public notice given." Had the court stopped here, its decision would be authoritative as to the construction of an Illinois statute. But it proceeds to remark: "There would appear to be *no other practicable way* in which the matter *could* be determined,"—and this, although the proof in the case showed that there was at least one other practicable and much safer way of determining it, viz., by a reference to the registration books. It is indisputable that the votes cast at an election, especially a special one, never represent the whole number of voters; for many must be absent, ill or infirm. A statute may give to the majority of those voting the power of a majority of all the persons qualified to vote; but the mathematical *fact* is beyond the power of a statute.

Did such *obiter dicta* as those above referred to, affect merely a bond question, they would be of minor importance. But they are dangerous in a wider sphere. The tendency of constitutional reform in this country is to call forth the entire constituency to take part in the government. This tendency exhibits itself, in one direction, by the introduction of "minority representation," as provided in the latest constitution of Illinois; and in another, by requiring the assent of a majority of all voters in a district to authorize a mortgage upon it in the shape of a municipal bond, and refusing that power to the accidental majority of the voters whom a special election may call to the polls. It is to be regretted that the Supreme Court of Illinois should encourage an opposite tendency.

Mr. Low says: "The question of the public faith and credit is paramount to mere individual rights." Without assenting to this precedence given to the creditor, I suggest that neither public faith and credit nor individual rights are safe, except under a strict compliance with constitutions and laws. T. C. R.

St. Louis, July 11, 1877.

NOTES OF RECENT DECISIONS.

Removal of Causes—Time for Filing Petition—Meaning of "First Term."—*Huddy v. Havens.* United States Circuit Court, Eastern District of Pennsylvania, 1 Month. Jur. 167. Opinion by McKennan, J.—The petition to remove a cause to the United States courts must be filed at or before the term at which said cause *could be first tried.* By this is meant not the term at which, owing to the condition of the docket, it would be reached for trial, but the term at which it could be tried, or was subject to be tried on its merits.

Removal of Causes—Sufficiency of Affidavit. *Delaware Construction Co. v. Davenport, etc., R. R.* Supreme Court of Iowa, 9 Ch. L. N. 354. Opinion by Day, C. J.—1. An affidavit for the removal of a cause to the federal court which merely states that certain parties to the suit are non-residents of the state where suit is brought, but fails to state that they are residents of some other state, is insufficient. Such affidavit should show affirmatively the citizenship of the parties and that they are residents of some other state of the United States. 2. An affidavit that parties were non-residents on the 6th day of April, 1874, does not prove that they were such non-residents on the 19th day of May, 1875.

"Civil Damage" Laws—Proximate and Remote Cause.—*Shugart v. Egan.* Supreme Court of Illinois, 1 Month. Jur. 145. Opinion by Scholfield, J.—*Held*, that in actions under the liquor law for damages against a saloon keeper, the word *damages* should be construed with reference to its known legal signification; that is, such damages as in legal contemplation, are to be regarded as the result of the wrongful act; that it does not follow because a person, while in a state of intoxication receives an injury, that it can be said in a legal sense, that the intoxication caused the injury. *Per* Sheldon, C. J., and Scott, J., dissenting: That it is a natural and every-day occurence for an intoxicated person to provoke a quarrel and receive an injury by reason of his intoxication.

Nuisance—Power of City Council to Declare what is—Shade Trees.—*Everett v. City of Council Bluffs.* Supreme Court of Iowa, 11 West. Jur. 416. Opinion by Seevers, J.—1. A general grant of power to a city council "to declare what shall be a nuisance, and to prevent, remove or abate the same," will not authorize the council to declare anything a nuisance which is not such at common law, or has not been declared such by statute. 2. Shade trees standing just within the curbing of the sidewalk on a street, do not constitute a nuisance, where they are no obstructions to the travel along such street; and an owner of the abutting lot may enjoin the city authorities from cutting down such trees, although the city council may have declared the same a nuisance and directed their abatement as such. Citing Bills v. Belknap, 36 Iowa, 583; Patterson v. Vail, 42 Iowa, 143.

Fire Insurance—"Fallen Building."—*Breuner v. Liverpool, London and Globe Ins. Co.* Supreme Court of California, 6 Ins. L. J., 475. *Per Curiam.*—1. If a policy of insurance against fire contains a clause that, if the building shall fall except by fire, the insurance shall immediately cease, and the walls of the building are of brick, and a portion falls, leaving more than three-fourths standing, the building is not a fallen building within the condition of the policy, and if destroyed by fire in that condition, the insurance company is liable for the loss. 2. A clause in an insurance policy, that the same shall be void if any change occurs in the building by which the degree of risk is increased, without the written consent of the company, has reference only to a change produced by the act of the insured, to which the company could consent upon application of the insured, and not to a change occasioned by accident or a cause over which the insured had no control.

RAILWAY AID BONDS—EXCESSIVE ISSUE—AUTHORITY TO ISSUE NOT AUTHORITY TO SELL—INJUNCTION.—*Daviess Co. v. Howard.* Court of Appeals of Kentucky, 16 Am. Law Reg. 428. Opinion by PRYOR, J.—1. A county, under legislative authority, having voted to subscribe $250,000 to the stock of a railroad company, and the legislation permitting bonds to be issued for the amount so subscribed, the county court issued bonds and sold them at a large discount, until enough were sold to pay the $250,000. *Held*, that the county board exceeded its powers in issuing bonds to a larger amount than the sum subscribed. 2. An authority to issue bonds to a specified amount, is not an authority to sell bonds to raise that amount. 3. The county court having thus exceeded its powers, can not, by any subsequent action, affirm and validate its unauthorized proceedings. Express legislation would be necessary for that purpose. 4. On a bill filed by tax-payers to enjoin the levy of a tax to pay interest on the bonds issued in excess of $250,000, it appeared that the bonds were all sold to the railroad company in whose aid they were voted, and consequently with full knowledge on the part of its officers of all the facts. *Held*, that the relief prayed for should be granted, as the bonds in excess of the sum permitted were nullities in the hands of the company.

UNITED STATES SUPREME COURT DECISIONS.

October Term, 1876.

ERROR TO STATE COURT—QUESTIONS OF FACT—IOWA PRACTICE.—*Melendy v. Rice.* In error to the Supreme Court of the State of Iowa. Opinion by Mr. Chief Justice WAITE. Case brought upon a writ of error issued under Rev. Stat. U. S., § 709. 1. Whenever the judgment of the highest court of a state is brought here for the re-examination of some decision of a federal question, the question will be considered as it comes to us from that court. This record shows that the question below was, whether a finding of fact by a referee should be set aside because not sustained by the evidence. Upon writs of error to the courts of the United States, the United States Supreme Court can not be called upon to decide such a question, because the finding of the court below as to facts is conclusive upon us. Norris v. Jackson, 9 Wall. 127; Insurance Co. v. Sea, 21 Wall. 160. But in Iowa a different practice prevails, and the rule has been so far, and only so far, relaxed as to permit the appellate court to set aside a judgment of an inferior court because against the weight of the evidence, when there is no evidence whatever to support it, or when there is such an absence of evidence that it may be presumed to have been given through the influence of passion, prejudice or favor. Rice v. Melendy, 41 Iowa, 400; Wilson v. B. & M. R. R. R. Co., 33 Iowa, 592; Starker v. Leese & Mahone, Id. 595; Pearson v. Minturn, 18 Iowa, 37; Bellamy *et al.* v. Doud, 11 Iowa, 255. The judgment must be clearly and manifestly wrong.

BANKRUPTCY—APPEAL FROM DECISION OF CIRCUIT COURT.—*Conro v. Crane.* Appeal from the Circuit Court of the United States for the Northern District of Illinois. Opinion by Mr. Chief Justice WAITE. Appeals do not lie to this court from the decisions of the circuit courts in the exercise of their supervisory jurisdiction under the bankrupt law. At the present term, in Wiswall v. Campbell, 4 Cent. L. J. 149, it was held that "a proceeding in bankruptcy, from its commencement to its close upon the final settlement of the estate, is but one suit. The several motions made and acts done in the bankrupt court in the progress of the cause are * * * but parts of the suit in bankruptcy from which they can not be separated." And again: "Every person submitting himself to the jurisdiction of the bankrupt court in the progress of the cause for the purpose of having his rights in the estate determined, makes himself a party to the suit, and is bound by what is judicially determined in the legitimate course of the proceeding." And in Sandusky v. National Bank, 23 Wall. 293, it was decided that "any order made in the progress of the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by the vacation."

LOUISIANA ACT REQUIRING THE SURVEY OF THE HATCHES OF ALL SEAGOING VESSELS UNCONSTITUTIONAL.—*Foster v. The Master and Wardens of New Orleans.* In error to the Supreme Court of the State of Louisiana. Opinion by Mr. Justice SWAYNE. The act of the State of Louisiana, of March 6, 1869, authorizing the master and wardens of the port to make a survey of the hatches of all sea-going vessels which should arrive at that port, and forbidding such survey to be made by any other persons, is unconstitutional and void, as being a regulation of commerce and undertaking to authorize the performance of a duty exclusively within the control of Congress. In the Steamship Company against The Port Wardens, 6 Wall. 31, it was held that a statute of a state enacting that the master and wardens of a port within it should be entitled to demand and receive, in addition to other fees, the sum of five dollars, whether called on to perform service or not, for every vessel arriving in that port, was a regulation of commerce, and was unconstitutional and void. If the constitutional objection was well taken there, *a multo fortiori*, is it fatal here. The act is not, in the sense of the constitution, an inspection law. The object of such laws is to certify the quantity and value of the articles inspected, whether imports or exports, for the protection of buyers and consumers. Gibbons v. Ogden, 9 Wheat. 203; Brown v. Maryland, 12 Wheat. 419; Clintsman v. Northrup, 8 Cow. 46; Bouv. Law Dic., "Inspection;" Story's Const., secs. 1017, 1024; Neilson v. Garza, 2 Woods, 290. The purpose of this act is to furnish official evidence for the parties immediately concerned, and where goods are damaged, to provide for and regulate their sale. Master and Wardens v. Ship Hawes. 6 Lou. Ann. Rep. 390. Besides the unreason and oppressive character of the act as regards ship-owners and consignees, it is an invasion of the rights of persons outside of these classes. If such a monopoly, sustained by such sanctions, may be validly given to the master and wardens, why may they not also, at prices not agreed upon by the parties, nor according to the market value, but at rates arbitrarily fixed by law, be authorized exclusively to load and unload ships, to furnish them with all needful supplies, and to perform all the services of consignees, commission merchants and ship-brokers, touching incoming and outgoing cargoes? Each of these imagined cases is a parallelism to this case, and only another step in the same direction. "In expressing these views we have no purpose to impugn anything heretofore said by this court as to the power of the states to establish inspection, quarantine, health and other regulations within the sphere of their acknowledged authority. The constitutional validity of such regulations is as clear as the power of Congress to establish regulations of commerce. It is no objection to the former that both operate upon the same subject. Gilman v. Philadelphia, 3 Wall. 730; *Ex parte* McNeil, 13 Wall. 240."

NOTES OF RECENT ENGLISH DECISIONS.

LARCENY — RECEIVING — HUSBAND AND WIFE — ADULTERY.—*Queen v. Kenny.* Crown Cases Reserved, 25 W. R. 679. A wife can not steal the goods of her husband; therefore, where a wife carried away goods from her husband and committed adultery with the prisoner, who then received the goods from her, and was convicted of receiving them knowing them to have been stolen, *held*, that the conviction was wrong.

NEGLIGENCE — MASTER AND SERVANT — COMMON EMPLOYMENT.— *Swainson v. North Eastern R'y*, High Court, Ex. Div., 25 W. R. 676.—The railway signal service of the defendant company and the G. N. R. Co., at a joint siding was managed at joint expense by a joint staff of servants, who were, however, engaged and paid by the latter company alone, whose uniform they wore. One of these servants, whilst engaged in his usual employment as pointsman at the siding, was killed by the negligence of an engine-driver in the service of the defendants alone. *Held*, that there was a common employment, and that the defendants were not liable in an action at the suit of the widow.

BILL OF LADING—STOPPAGE IN TRANSITU—TRANSFEREE FOR VALUE—PAST CONSIDERATION.—*Leask v. Scott.* Court of Appeal, 25 W. R. 654.—G applied to the plaintiff for an advance, which the plaintiff gave upon his promising to "cover up" his account. G accordingly, four days after, handed the plaintiff a bill of lading he had in the meantime received from the defendants; two days after which he became insolvent. The defendants stopped the goods. *Held*, (reversing the decision of the Queen's Bench Division) that the plaintiff was entitled to the goods as against the defendants, who were unpaid vendors. Rodger v. The Comptoir d'Escompte de Paris (17 W. R. 468, L. R. 2 C. P. 393), not followed.

WILL—CONSTRUCTION—GENERAL BEQUEST—SUBSEQUENT SPECIFIC ENUMERATION.—*King v. George.* Court of Appeals, 25 W. R. 638. A testatrix made her will as follows: "I, G. S., do bequeath to A. K. G. all that I have power over, namely, plate, linen, china, pictures, jewelry, lace, the half of all valued to be given to H. G., son of F. G.; the servants in the house who have been a year with me, to receive £10, and clothes divided among them; also all kitchen utensils." *Held*, that the bequest was not limited to the articles specifically enumerated, although these comprised only an insignificant portion, and did not consist of the principal part of the estate, but passed the whole of the real and personal estate of the testatrix. Decision of Malins, V. C. (25 W. R. 266; L. R., 4 Ch. D. 435), affirmed.

INJURIES INFLICTED BY FURIOUS DRIVING — ORDER OF MAGISTRATE FOR PAYMENT OF COMPENSATION, A BAR TO FUTURE PROCEEDINGS BY INJURED PERSON.—*Wright v. London Omnibus Co.* High Court, Q. B. Div., 25 W. R. 647. A was injured by the furious driving of the defendants' servant. The driver was summoned by the police, and A attended as a witness. The driver was fined, and was ordered by the magistrate to pay to A £5 by way of compensation under the provisions of 6 and 7 Vict., c. 86, s. 28. A was asked by the magistrate if that sum would compensate him, and he said it would not, nevertheless he took it. In a subsequent action for damages by A against the driver's employers,—*held*, that the order of the magistrate was a bar to the action, inasmuch as A must be taken to have accepted the £5 in full satisfaction of his claims in respect of his injuries.

WILL — NEXT OF KIN ACCORDING TO THE STATUTES OF DISTRIBUTION — PERIOD AT WHICH THE CLASS IS TO BE DETERMINED.—*Mortimore v. Slater.* High Court, Chy. Div., 25 W. R. 646. A testator, having divided a fund into four equal shares, giving a share to each of his four daughters for life, and then to her children, and, in case she should die without issue, the interest of her share to be divided among such of the other daughters as should then be living, and from and immediately after the decease of the last surviving daughter, if she should die without leaving issue, such share to be paid "to such person or persons as will then be entitled to receive the same as my next of kin under the statute for the distribution of intestates' estates:" *Held*, that the next of kin were a class to be ascertained at the death of the last-surviving daughter, and not at the death of the testator.

RAILWAY COMPANY — NEGLIGENCE—ACCIDENT TO PASSENGER—OVERCROWDING.—*Jackson v. Metropolitan Ry. Co.*, High Court, C. P. Div., 25 W. R. 661. The plaintiff was a passenger on defendants' railway, and was in a carriage into which, at one station, three persons above the proper number entered. There was no evidence that the defendants were aware of this having been done. At the next station more persons attempted to enter the carriage, and the plaintiff rose from his seat to prevent their doing so. The train having started, a porter pushed away those persons and shut the door, which caught and injured the thumb of the plaintiff, who was thrown forward by the motion of the train, and put out his hand to save himself. *Held*, by Cockburn, C. J., and Amphlett, J. A. (Kelly, C. B., and Bramwell, J. A., diss.), that there was evidence of negligence to go to the jury. Decision of the Court of Common Pleas (reported 23 W. R. 78, L. R. 10 C. P. 49) affirmed.

LIFE INSURANCE—INSURABLE INTEREST—WAGERING POLICY. *Branford v. Saunders.* High Court, Ex. Div., 25 W. R. 650.—A and K jointly executed a bond as a collateral security for the repayment of £300 and interest. A effected policy of insurance on K's life. *Held*, that the policy was not void within 14 Geo. III, c. 48, K being, for the purposes of the policy, A's debtor to the extent of half the debt secured by the bond. Pollock, B.—The contention of the defendants is that the plaintiff had no legal interest in Ann Kitchin's life, and that on her death he would be in a better position than before, as he would then have the whole of the property of which he was only joint owner during her life; but in considering this we must take into consideration the mortgages, and the bond executed by them jointly. Now, the plaintiff and Ann Kitchin were jointly liable on the bond and the covenants of the mortgages, and, in the event of Ann Kitchin dying, the plaintiff became bound to pay the whole. The result is that the plaintiff may be looked on in one view as the creditor of Ann Kitchin, and I think he must be looked on as having an insurable interest in her life within the meaning of the statute. But on working out the figures we find that, with regard to the extent of that interest, the plaintiff had not an interest in her life to the full amount of the bond, but only as to one-half. For these reasons, I am of opinion that he can maintain this action, as having an insurable interest, but to the extent only of one-half of the debt secured by the bond.

SHIPPING — CHARTER-PARTY — CONSTRUCTION — NEGLIGENCE OF MASTER AND CREW — LOSS OF CARGO — LIABILITY OF SHIP-OWNER.— *Omoa and Cleland Coal and Iron Co. v. Huntley.* C. P. Div., 25 W. R. 675. By a charter-party made between the

plaintiffs, the charterers, and the defendant, owner of the steamship Vesper, it was agreed "that the said vessel or steamer, being tight, staunch and strong, and in every way fitted for the voyage or service, and so maintained by owners, with a full complement of officers, seamen, engineers and firemen adapted to a steamer of her class, shall be placed under the direction of the said charterer or merchant or his assigns, to be by him or them employed for the conveyance of lawful merchandise and or passengers as follows: Between ports in the U. K. and the Continent, etc. The said steamer is let for the sole use of the said charterers and for their benefit for the space of six months, with option of twelve calendar months at charterers' option. The charterers to have the whole reach of the vessel's holds and usual places of loading, including passengers' accommodation, if any, sufficient room being reserved to the owners for the crew, necessary tackle, apparel, and furniture of the said vessel, and she is not to be required to load more than she can reasonably stow and carry, over and above her tackle, provisions, stores, and fuel. The captain shall use all and every dispatch possible in prosecuting the voyages, and the crew are to render all customary assistance in loading and discharging. The captain to sign bills of lading as presented without prejudice to this charter-party, to follow the instructions of the charterers or their assigns or consignees as regards loading, discharging, and departure. The coals for the steam-engines shall be supplied by and at the cost of the charterers, as also all port and dock charges, pilotage, and extra laborage that may be required in addition to the crew for loading and discharging, the owners finding all ship's stores, paying crew's wages, and necessary stores for the engine-room—that is, oil, tallow, and waste; also dunnage and insurance on the ship. The freight for the hire of the said steamer shall be as follows, viz., £410 per month, payable in advance, until the vessel is again returned by the charterers, he or they having previously given not less than fourteen days' notice. That, in the event of the vessel being lost, the money advanced either by cash or bill upon the current month shall be returned in proportion to the number of days which she may not have completed of that month. Should the vessel, from break-down of engines, put into any other ports than those to which she is bound, the port charges, pilotages, etc., at those ports to be borne by the owners. The owners to have a lien upon all freight and cargo for arrears of hire. The charterers to have a lien on the ship for the monthly freight paid in advance. The vessel to be delivered up to the owners on the termination of this charter-party at Clyde or Forth. The captain to furnish the charterers, their agents or supercargo, when required, a true daily copy of log, and to take every advantage of wind by using sails with a view to economize the expenditure of coal." The master and crew were engaged and paid by the defendant. During the continuance of the charter-party the vessel was stranded and the cargo totally lost, it was assumed, through the negligence of the master and crew. In an action by the charterers against the owners for the loss: *Held*, that on the true construction of the charter-party the master and crew were the servants of the owner, and that he was liable for their negligence.

IN A recently published report, the estimated total and net cost of legal business of public departments in England for 1875 is stated, the salaries at £62,767; fees and other law charges, £75,923, making a total cost of £138,690; the miscellaneous receipts carried to the Exchequer, £27,858, leaving the net cost, £110,832. The expenses of administration cases and divorce interventions are not included. About £40,000 a year are paid into the Exchequer as the Crown's share in administration cases.

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

May Term, 1877.

HON. SAMUEL E. PERKINS, Chief Justice.
" HORACE P. BIDDLE,
" WILLIAM E. NIBLACK,
" JAMES L. WORDEN,
" GEORGE V. HOWK,
} Associate Justices.

PROMISSORY NOTE—REPRESENTATIONS BY MAKER—ESTOPPEL.—The representations made by the maker of a note to the assignee thereof, after his purchase of the note, and which did not induce the purchase, will not estop the maker from setting up any defense he may have to such note, in the hands of such assignee. 19 Ind. 384; 21 Ind. 249; 39 Ind. 384. Judgment affirmed. Opinion by HOWK, J.—*Reagan et al. v. Hadley.*

ENDOWMENT-NOTE—CONDITIONAL DELIVERY.—1. A note, given as a subscription to an endowment fund, requires no consideration to support it except the accomplishment of the object in aid of which the money was promised. 2 Ind. 555. 2. The delivery of a note to the payee, to be held in trust, is in law an absolute delivery, and parol evidence can not be given to vary the legal effect thereof. 10 Ind. 1. Judgment affirmed. Opinion by HOWK, J.—*Roche v. The Roanoke Classical Seminary.*

LIABILITY OF COUNTY TREASURER FOR INTEREST DUE ON A COUNTY ORDER.—An action will lie for interest due on a county order, though the holder has received the principal in full. 32 Ind. 328. Where a county treasurer refuses to pay an order when presented to him, or to indorse thereon "not paid for want of funds," he is guilty of such a breach of official duty as will render him liable for all the interest that accrues on such order from the time of its presentment until it is paid. Judgment affirmed. Opinion by HOWK, J.—*Marks v. Trustees of Purdue University.*

VENIRE DE NOVO—SPECIAL FINDING OF FACTS.—It is only where the finding is vague, indefinite or ambiguous, or some material omission has been made, that a *venire de novo* will be awarded, when the facts have been found by the court. 23 Ind. 473; 42 Ind. 134. When a party excepts to the conclusions of law of the court on a special finding of the facts, he admits that the facts have been fully and correctly found and can only claim that the court erred in applying the law to the facts. Judgment affirmed. Opinion by NIBLACK, J.—*Dehority et al. v. Nelson.*

PROMISSORY NOTE—WANT OF CONSIDERATION—NOTICE.—As a general rule, all questions of fact should be left to the jury, but where there is no evidence tending to prove the existence or non-existence of a material fact, it is not error for the court to so tell the jury. 42 Ind. 544. And where the plaintiff knew simply, before he purchased the note in suit, that it was given for a patented article, it was not error for the court to charge that there was no evidence tending to show that he had notice that the note was procured by fraud or without consideration. 54 Ind. 164. Judgment affirmed. Opinion by PERKINS, C. J.—*Kline v. Spahr.*

EMINENT DOMAIN—TITLE OF THE STATE IN THE BED OF A CANAL.—1. Where the state acquired land, either by conveyance or appropriation under sec. 9 of the act of January 9, 1832, for the purposes of a public canal, the state acquired the fee simple, and not a mere easement therein. 26 Ind. 36; 41 Ind. 364. Such appropriation required no particular formality, and merely entering upon and using the land was sufficient. 2. Where the state, and those claiming under her, were in the peaceable possession of land for forty years under color of title, it may well be presumed that the proper conveyances were executed so as to vest the title in the state. 10 Johns. 377; 5 Mo. 291; 24 Pick. 319; 2 Met. 363. Judgment affirmed. Opinion by WORDEN, J. [BIDDLE, J., dissented, holding that the state had only an easement.]—*Nelson et al. v. Fleming.*

PUBLIC NUISANCE—POWERS OF CITY OVER STREETS AND ALLEYS—PLEADING—ESTOPPEL.—1. A city has exclusive jurisdiction of its streets and alleys, not for the purpose of appropriating them in perpetuity to the use of private individuals, but to keep them open and free to all. 12 Ind. 315; 1 Denio, 524; 1 Page, 213; 9 Wend. 571. And where the owners of a building leased the same to the city, and the condition was that they were to construct an iron

stairway on the outside of the building, occupying for that purpose five feet of the adjoining alley, and by the contract the city granted to said parties a perpetual right to maintain such stairway: *Held*, the stairway was a public nuisance, and that the city had no power to contract for such a structure in such a place. 2. If the complaint, in an action for the abatement of a nuisance, shows some special present material injury which will be as continuous and perpetual as the nuisance, this will be sufficient to sustain the suit, and allegations as to other possible future injury will be but surplusage, and will not vitiate the complaint. 1 Md. 525; 19 Peck, 147; 7 Ind. 9. 3. The common council of a city can only contract by ordinance, resolution or order, and an illegal and void contract can not form the groundwork of an estoppel. Judgment affirmed. Opinion by PERKINS, C. J.—*Pettis v. Johnson et al.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

January Term, 1877.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

UNAUTHORIZED PAYMENT.—1. The authority of a county attorney to represent the county, terminates with his term of office. Payment to him thereafter by the clerk of the district court, with knowledge of the expiration of his term of office, of money collected on a judgment in favor of the county, is not payment to the county, notwithstanding such judgment was rendered in an action brought by him as county attorney during his term of office. Judgment affirmed. All the justices concurring. Opinion by BREWER, J.—*Munson et al. v. Board of County Commissioners of Morris County.*

And such undertaking is approved by the justice and filed with him, *held:* that the undertaking is in effect a statutory bond; that the words "touching the attachment herein," should be treated as surplusage, and that the defendants are liable on the undertaking, on failing to pay the judgment in the original action. 2. All the parties in a bail bond in attachment may be sued thereon, without issuing execution against the principal. It is sufficient to set forth in the bill of particulars the bond, a release of the attached property thereon, the judgment against him, and its non-payment. It is a matter of defense to show a satisfaction of the judgment. Judgment reversed. All the justices concurring. Opinion by HORTON, C. J.—*Endress v. Ent et al.*

ATTACHMENT—BAIL BOND—SURPLUSAGE—WORDS.—1. Where E causes an undertaking to be executed in a civil action pending before a justice of the peace, in which an order of attachment has issued and a levy made on E's personal property, to obtain a release of the property from attachment, in the following form, viz:

William Endress, plaintiff, }
vs.
M. L. Ent, defendant. }

We bind ourselves to the plaintiff, William Endress, in the sum of eighty-five dollars, that the defendant, M. L. Ent, shall perform the judgment of the said magistrate in this action *touching the attachment herein.*.

M. L. ENT,
JOHN C. DOUGLAS.

COSTS.—1. Where C brought an action in trespass before a justice of the peace against M., and recovered a judgment for $37.50, and thereafter M brings an action in trespass against C before a justice of the peace, and recovers judgment for $15.00, and both actions are duly appealed to the district court, and by consent are there consolidated and tried as one action, and a verdict rendered in favor of M for five cents, *Held:* that the judgment would carry the entire costs of the consolidated action, and in the case of Moll v. Cockerell, notwithstanding the fact that C had, in the action brought by M., and before the trial in the justice's court, offered in writing to consent to a judgment in favor of M. in that action for $5 00. Judgment affirmed. All the justices concurring. Opinion by BREWER, J.—*Cockerell v. Moll.*

ABSTRACT OF DECISIONS OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

March Term, 1877.

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT, } Associate Justices.
" SETH AMES,
" MARCUS MORTON,
" WILLIAM C. ENDICOTT,
" AUGUSTUS L. SOULE,
" OTIS P. LORD,

NEGLIGENCE.—A defendant, whose men are employed in breaking and laying bricks in the construction of a wall adjoining a public thoroughfare, is bound to use proper safeguards or barriers so that travelers may not be exposed to injury by the falling of the bricks, and in default of such precaution may be liable even if the workmen are in the exercise of ordinary care, and the immediate cause of such fall is an accident. Opinion by COLT, J.—*Jager v. Adams.*

NEGLIGENCE—LIABILITY OF OWNER FOR INJURY BY FALLING BUILDING.—As to whether it is the duty of every owner of land to keep the buildings or structures thereon in such a condition that they shall not, by falling or otherwise, cause injury to persons or property upon adjoining land; *quære.* But assuming that this duty is absolute, while the structures are in the condition in which the owner has put them, or knows or is bound to know them to be, yet when he has been guilty of no negligence, and the condition of the structures has been changed so as to render them injurious or dangerous, by *vis major*, or the act of a third person, which the owner had no reason to anticipate, he can not be held liable for the injury, or bound to make the structures safe, until he has had a reasonable time, after they have so become dangerous, to take the necessary precautions. Nichols v. Marsland, L. R. 10 Ex. 255; 2 Ex. D. 1; Gray v. Harris, 107 Mass. 492. Opinion by GRAY, C. J.—*Mahoney v. Libbey.*

BETTERMENT—ESTIMATION OF DAMAGES.—1. On a petition to reduce the amount of two assessments laid upon adjoining lots for the expense of widening a street, an instruction of the judge below to the jury that the assessment in one case applied to all the petitioner's land east of a private way separating the two lots, and in the other, to all the remaining land included in the deed to him, will not be held error when it was the manifest design to include the whole of the land in both assessments and the situation and use of the estate as shown in the evidence before this court do not disclose anything to the contrary. 2. In such a case the question for the jury being the permanent benefit and advantage, if any, to the estate, the temporary inconvenience caused by the work is a matter so insignificant and remote that it may properly be excluded as an element in their estimate. Brooks v. Boston, 19 Pick. 174. 3. The benefit is to be estimated as of the date of the widening; subsequent changes, such as unusual depression in business, or loss of trade from any cause, can not be taken into account to affect the jury's estimate. Jones v. Boston, 104 Mass. 461; see also G. S., c. 43 § 14; Parks v. Boston, 15 Pick. 198; Dickenson v. Fitchburg, 13 Gray, 546. Opinion by COLT, J.—*Treadwell v. Boston.*

NEGLIGENCE—DEFECTIVE HIGHWAY.—1. The Gen. Stat., c. 44, §§ 1-22, imposing the duty of repairing highways upon the town or city in which they are situated, and allowing an action to one injured by its negligence, do not limit the liability to open and visible defects, but it extends to all defects. 2. Ordinarily the question whether a defect exists at the time of the injury, and whether it has existed for twenty-four hours, the period after which the town is by the statute presumed to have had notice of the defect, are questions of fact exclusively for the jury. 3. While it is clear that one who would be liable over to the city if it is compelled to pay damages for an injury caused by a defect in a sidewalk which he is bound to repair, could not maintain an action against the city for an injury to himself by such defect; yet this rule can not be extended to a plaintiff who was lessee of two rooms in the house and had no right in or control over the coal-cellar, a defect in the covering of which caused the injury, nor was under any duty or obligation to repair the sidewalk, nor liable to any one for an injury caused by a defect in it. Kirley v. Boyl-

ston Market Ass'n, 14 Gray, 249; Shepley v. Fifty Associates, 106 Mass. 194; Leonard v. Stone, 115 Mass. 86; Larne v. Farren Hotel Co., 116 Mass. 67; Bartlett v. Boston Gas Light Co., 117 Mass. 533, distinguished. Opinion by MORTON, J.—*Burt v. Boston.*

LIBEL—SPECIAL DAMAGE — PRIVILEGED COMMUNICATION—MALICE.—1. An action for publishing a false and malicious statement concerning the plaintiff's property, can not be supported without allegation and proof of special damage. Malachy v. Soper, 3 Bing. N. C. 371; s. c., 3 Scott, 723; Swan v. Tappan, 5 Cush. 104. 2. When the special damage alleged was the loss of the sale of a certain statue belonging to plaintiff (known as the "Cardiff Giant"), evidence of the value of the statue as a scientific curiosity, or for purposes of exhibition, was rightly rejected as immaterial. 3. The editor of a newspaper has the right, if not the duty, of publishing, for the information of the public, fair and reasonable comments, however severe in terms, upon anything which is made by its owner a subject of public exhibition, as upon any other matter of public interest; and such a publication falls within the class of privileged communications for which no action can be maintained without proof of actual malice. Dibden v. Swan, 1 Esp. 28; Carr v. Knight, 1 Campb. 355; Hernwood v. Harrison, L. R. 7 C. P. 606. 4. Malice in uttering false statements may consist either in a direct intention to injure another, or in a reckless disregard of his rights and of the consequences which may result to him. Com. v. Bonner, 9 Metc. 410; Moore v. Stevenson, 27 Conn. 13; Erle, C. J., in Hillis v. Wilkinson, 1 F. & F. 608, 610, and in Paris v. Sevy, 2 F. & F. 71, 74, and 9 C. B. N. S. 342, 350; Cockburn, C. J., in Morrison v. Belcher, 3 F. & F. 614, 620, in Headly v. Barlow, 4 F. & F. 224, 231, and in Strauss v. Francis, 4 F. & F. 1107, 1114. Opinion by GRAY, C. J.—*Gott v. Pulsifer et al.*

EMINENT DOMAIN—WATER-RIGHTS.—1. The Statute of 1872, c. 177, authorizes the city of B to take hold and convey to said city all the water of S river at any point in or above the town of F, and provides for payment to any one injured in their property by the taking of or injury to any land, real estate, water, or water-rights, or by flowage, or by the interference with or injury to any use or enjoyment of the water of said river to which any person at the time of such taking is legally entitled, subject to all the duties, liabilities and regulations of the statutes of 1846, c. 167, and 1850, c. 316. Under a petition to assess damages to plaintiff's rights, the only injury alleged to have been suffered (omitting an alleged right of fouling the water by its dye-works), is that the filing of the order or certificate required by the statute to be recorded in the registry of deeds, is an appropriation of all the waters above the dam, and is equivalent to a warranty deed conveying those to the city by an absolute title. *Held*, that the statute does not make the city the owner of the water for any other purpose than that of supplying it with pure water, that the riparian proprietors higher up still retain all their common-law rights in the river so far as they are not inconsistent with the use defined in the statute, and that the defendant is at least entitled to say that it has not only done nothing as yet to practically diminish the petitioner's water-power, but that there is at most only a remote possibility that it will ever do so. Ipswich Mills v. Comm'rs, 108 Mass. 363, and Wamesit Power Co. v. Allen, *Ib.* 352, distinguished. 2. A riparian proprietor, in the absence of any express grant or prescription, has no right to foul or corrupt the water of a running stream. An injury to the purity or quality of the water, to the detriment of other riparian owners, constitutes, in legal effect, a wrong and invasion of private right in like manner as a permanent obstruction or diversion of the water. Merifield v. Lombard, 13 Allen, 16. Opinion by AMES, J.—*Dwight Printing Co. v. Boston.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF MISSOURI.

April Term, 1877.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON, }
" WARWICK HOUGH, } Associate Justices.
" E. H. NORTON, }
" JOHN W. HENRY, }

ADMINISTRATOR'S SALE OF LANDS.—Under secs. 2 and 3 Wag. Stat., pp. 93 and 94, a sale made by an administrator of lands which his intestate had bought, but had not fully paid for, upon the order of the court, is a valid sale without an appraisement of the estate, or petition for such sale. 19 Mo. 454. Opinion by NORTON, J.—*Garnett v. Bickwell.*

INJUNCTION—FINAL JUDGMENT—APPEAL.—A judgment dissolving an injunction and awarding damages against the securities on the injunction bond, is not a final judgment, and no appeal lies therefrom. Janner v. Irwin, 1 Mo. 65; Carpenter v. Talbot, decided in 1873, but not reported. Opinion by HOUGH, J.—*Johnson et al. v. Township Board of Education.*

ATTACHMENT—DEMAND NOT DUE—JURISDICTION—AFFIDAVIT.—Although the attachment law provides that no attachment shall issue against a non-resident, where the demand is not due, it is not necessary that the affidavit should state that the demand is due, especially where the petition shows the maturity of the demand. Opinion by SHERWOOD, C. J.—*Mastin et al. v. First Nat. Bank.*

CERTIFICATE OF DEPOSIT—RATE OF INTEREST AFTER MATURITY.—It was settled by this court twenty-one years ago, in the case of Payne v. Clark, 23 Mo. 259, that a certificate of deposit, payable six months after date, with interest at the rate of six per cent. per annum from date, *continues* to bear interest at the same rate after maturity, although not presented for payment when due. Opinion by SHERWOOD, C. J.—*Cordell Adm's, v. First Nat. Bank.*

QUIETING TITLE—CONSTRUCTION OF MISSOURI STATUTE.—The provisions of the statute relating to proceedings to quiet titles, do not authorize the court to render judgment that the adverse claimant shall bring an action for this purpose, unless the petitioner be in possession of the land. An answer which denies possession, raises an issue which must be determined in favor of the petitioner before the court can render judgment requiring the adverse claimant to bring an action. 31 Mo. 333; 42 Mo. 216. Opinion by NORTON, J.—*Beebe v. Phelps.*

EJECTMENT—LOST CORNER.—Where the quarter section corner established by the United States was lost, and the rights of the parties depends upon the location of the dividing line between the lands described in their respective patents, the half section in which the lands lie being fractional and not containing enough land to satisfy both patents, it is *held*, that in such cases the regulations of the land department of the United States must control, and not the laws of the state. 57 Mo. 317. Opinion by HOUGH, J.—*Vaughan v. Tate.*

VENDOR'S LIEN—WAIVER.—The acceptance of a bond with security for the extinguishment of an incumbrance on real estate exchanged for other real estate, is not *conclusive* evidence of the waiver of the vendor's lien (47 Mo. 356; 40 Mo. 79), and evidence as to whether the acceptance of the security was *intended* to waive the lien, is admissible, the *onus* being on the party asserting the lien to show by facts and circumstances that it was not waived. Opinion by SHERWOOD, C. J.—*Pratt v. Eaton et al.*

RECEIPTS — BAILMENTS.—Defendant hired a horse of plaintiff and killed it by over-driving. Afterwards plaintiff presented an account against defendant, one item of which was for the hire of the horse that was killed. Defendant paid the account and took a receipt for the amount thereof, expressed to be in full of all demands. *Held*, that the receipt was not a bar to the action for the value of the horse, and that it might be explained by parol evidence (44 Mo. 444), and that a bailee is chargeable with both the hire and the value of the thing bailed, if lost by his negligence. Story on Bailments, § 417. Opinion by HOUGH, J.—*Bigbee v. Coombs.*

DAMAGES FOR EJECTING PLAINTIFF FROM R. R. CAR.—Plaintiff shipped stock on the railroad, under the usual special contracts as to return passes for employes in charge of stock, and his wife endeavored to return on one of these passes, which had been issued to L. Brown on the representation of her husband that she was the owner of some of the stock, which representation was false. The conductor, in a mild and gentlemanly way, ejected her from the car; she at once returned and proceeded on her journey, her husband paying her fare. The jury gave plaintiffs a verdict for $1,500, and plaintiffs remitted half of the amount. Defendant appealed from the judgment for $750, and the supreme court reverse and remand the case. Opinion by NAPTON, J.—*Brown v. M., K. & T. R. R. Co.*

INDICTMENT—DISTURBING PUBLIC WORSHIP.—No indictment lies under the statute making it a misdemeanor to disturb a camp-meeting or other congregation met for religious purposes, where the meeting was held at a street corner in open air, the place not having been set apart for such purposes. Opinion by NORTON, J.—*State v. Shieneman.*

EJECTMENT—COMMON SOURCE OF TITLE—IMPROPER JUDGMENT.—In ejectment, where plaintiff and defendant claim under the same grantor, the only question is who has the best title to the interest of the common grantor. Brown v. Brown, 45 Mo. 412; 2 Green. Ev. sec. 307; Adams' Equity, sec. 248; 7 Cow. 637; Sillows v. Wise, 47 Mo. 350. Where the circuit court improperly gave judgment for damages in an ejectment suit, the judgment will not be reversed if the plaintiff enter a remittur of the damages in the supreme court. Opinion by NORTON, J.—*Miller v. Hardin et al.*

NOTES.

THE grand jury of the Circuit Court of Baltimore County, in session at Townsontown, Maryland, presented last week indictments against its own judges—Chief Judge Richard Grayson and Associate Judge Yellot, for malfeasance of office. The indictment are based upon charges in the county auditor's report, setting forth that a fraud, involving $50,000, had grown out of change of venue cases. The indicted judges were on the bench when the return was made, and at once declared the court adjourned.

A VERY singular will case was brought to the attention of the Probate Court of Springfield, Mass., some days ago. A man died leaving his property one-third to his wife, one-third to his child, and the other third to a child then unborn. The unborn party proved to be twins, and the executor is sorely perplexed as to whether he shall divide the third, giving each of the twins one-sixth of the estate, or whether he shall carry out the testator's purpose to serve all the children alike by giving them and the widow each one-fourth, or whether, again, he shall give the widow her third and divide the other two-thirds among the three children. The case being wholly without precedent in that state, the court gave the executor no advice, and the conundrum is to be brought before the supreme court.

A JUST JUDGE.—When Saul was installed sovereign, Samuel retired from his office as judge with a public testimony to his honesty, integrity and thorough uprightness. He stood forth before the assembly at Gilgal, and said: "I have walked before you from my childhood unto this day; witness against me before the Lord, and before His anointed: whose ox have I taken? or whose ass have I taken? or whom have I defrauded? whom have I oppressed? or of whose hand have I received a bribe to blind mine eyes therewith? and I will restore it to you." Then the whole assembly responded in one unanimous approval of his conduct. "Thou hast not defrauded us, nor oppressed us, neither hast thou taken ought of any man's hand." Yet again Samuel put it to them, lest any haste should have led them to affirm what might be subsequently questioned. To make their utterances more solemn, he said: "The Lord is witness against you, and His anointed is witness this day, that ye have not found ought in my hand." At once the multitude responded: "He is witness." Thus, with an untarnished reputation, Samuel laid down his office.

THE Regents of the Michigan State University, have increased the fees required of students in the different departments, $5.00 for the first year and $10.00 for the second. Chief Justice Cooley, of the supreme court of that state, and Dean of the University Law School, has filed a protest against the action of the board, on the ground, 1, that the Law Committee of the university were not properly consulted. 2, that the law department is self-sustaining, and that the increase in fees will be taken to help out other branches, thus operating unjustly; and 3, that as theses charges are not made in return for anything the law student receives, they are a tax on the department for the benefit of others. The judge's protest then proceeds to say that this tax violates the spirit of our constitution and laws. The statutes relating to the university, contemplate that, so far as students residing in the state are concerned the institution shall be free. The law also violates all sound rules of taxation. Taxes are imposed for the benefit of those paying them, not for the benefit of others. As well might the people of one city be taxed to support the municipal government of another. I deny the right to levy any such tax. No power short of the sovereign could tax one person for the benfit of another. Moreover, by the express provisions of the law, educational institutions are exempt from taxation. Finally, the tax under pretense of equality operates to the prejudice and discouragement of the most successful departments of the university. Fidelity to its interests will not suffer me to remain silent under such circumstances.

SEWING MACHINE CONTRACTS.—In a decision handed down June 18, 1877, by the Common Pleas Court for the city of New York, general term, in the case of Haviland v. Johnson, Chief Justice Daily filed a dissenting opinion in which he expressed himself forcibly in regard to this class of contracts. The suit was brought to recover $45.00 paid for a sewing machine, bought on the installment plan, and on the trial below plaintiff recovered a judgment for her claim. The prevailing opinion, written by Judge Robinson, reverses this judgment, but the chief justice says: "I will never give my sanction to the enforcement of such an agreement as the one in this case. It is, upon its face, grossly unjust, and designed to take an unconscionable advantage of the ignorant, poor and needy. By its terms the sewing machine is sold to the plaintiff for $75.00. Fifteen dollars of this amount, it is declared, is paid in advance for the use of the machine; the rest was to be paid in monthly installments of $5.00; and if the woman fails in the last payment, it authorizes the vendors to enter her premises and re-possess themselves of the machine; to that for a failure to pay the last $5.00, they get the machine and the $70.00 that they may have paid on it, and in addition to this there is a further covenant, the consideration of which is declared to be the foregoing easy terms; that waiving any right in existing laws to the contrary, she will not bring any suit against the vendors or their agents for any damage done her person, her property, or the persons of her family, in recovering the machine. It is a reproach to the law that such an agreement should be allowed to be carried out in any of its provisions; and it would subserve the ends of public policy to hold that no recovery can be had under it from its palpable injustice."

CONCERNING the late trial in England of Charles Bradlaugh and Mrs. Besant, for publishing an obscene book, an English letter has the following: Mrs. Besant has the rare charm of speaking very clearly without any apparent effort, and throughout the trial she showed a power of following out and understanding a complex argument, which is not common even amid professional advocates. Indeed, when she made an effective, though somewhat illogical appeal to the court, at the conclusion of the proceedings, not to stamp her with the stigma of having published an obscene book, it was easy to understand the leniency shown towards the defendants, both by the judge and the jury. At the last, I suspect it was Mrs. Besant's persuasiveness, far more than the intrinsic weight of her plea, which induced the court to grant the defendants permission to apply for a writ of error with reference to the terms of the indictment. Mr. Bradlaugh was for many years the managing clerk of one of the most disreputable of Jew-money-lending attorneys who was ever struck off the rolls for professional misconduct, and his legal experience in *nisi prius* cases have probably suggested to him the ingenious plea on which he hopes to set aside the verdict. By the law of libel, the indictment, for very obvious reasons, is required to specify the exact terms of the accusation or statement to which exception is taken. By an accidental technicality obscene publications come under the definition of libel; and therefore Mr. Bradlaugh has started the objection that the indictment is null and void, because the whole of the "Fruits of Philosophy" is not engrossed upon the records. The objection has never been taken before now, as it is an outrage upon common sense to suppose that the publisher of an obscene work requires to have its contents repeated *verbatim* in the indictment, in order to understand the exact nature of the offense with which he is charged. Still, English lawyers have such an inherent weakness for a technical objection, so long as it is inconsistent with the ordinary sense, that I should not be altogether surpised if the indictment were to be quashed. Failing this off-chance, however, which lawyers regard as extremely improbable, Mr. Bradlaugh and his partner will be imprisoned for six months, and have to pay a fine of £200 each. The sentence is a severe one if you regard the defendants as honest and sincere advocates of an erroneous opinion, however pernicious be its effects upon the public.